SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 398

UNITED STATES OF AMERICA, PETITIONER,

vs.

STATE OF ALABAMA, ET AL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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(File endorsement omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

Civil Action No. 479-E

UNITED STATES OF AMERICA, *Plaintiff*,

v.

THE BOARD OF REGISTRARS OF MACON COUNTY, ALABAMA; GRADY ROGERS, E. P. LIVINGSTON, REGISTRARS, *Defendants*

Complaint—Filed February 5, 1959

The United States of America, Plaintiff, brings this suit against the Board of Registrars of Macon County, Alabama (hereinafter referred to as the "Registration Board"), and against Grady Rogers and E. P. Livingston, members thereof, and alleges that:

1. This action is brought under Part IV of the Civil Rights Act of 1957 (P.L. 85-315, 71 Stat. 634, 42 U.S.C. Sec. 1971) to obtain preventive relief against acts and practices by the Defendants which deprive other persons of rights and privileges secured by Section 1971(a) of Title 42, United States Code, namely the right and privilege of citizens of the United States, who are otherwise qualified by law to vote at any election by the people in the State of Alabama, to be entitled and allowed to vote at all such elections without distinction of race or color.

2. This Court has jurisdiction of this action under 42 U.S.C. §1971(d), and under 28 U.S.C. §1345.

3. The complaint in this action also seeks a declaration of the rights, duties, and legal relations of the parties in accordance with 28 U.S.C. §§2201 and 2202.

4. The Registration Board is an independent state agency of the State of Alabama which exists as a separate entity and without regard to its membership. It possesses the following powers and duties, among others:

(a) to receive and consider applications for registration at designated times and places in Macon County;

(b) to register all qualified applicants of Macon County;

(c) to preserve registration records according to state law;

(d) to operate a registration office.

The Registration Board is under a constitutional obligation to fulfill the foregoing duties without regard to considerations of race or color.

For many years the Registration Board, whatever its membership, has persisted in acts and practices in violation of this constitutional obligation, which have resulted in depriving qualified citizens of their right to vote solely by reason of their race or color. To obtain permanent preventive relief against such acts and practices, it is necessary that the judgment of the Court be entered against and become binding upon the Registration Board however constituted, so that the judgment will, to the fullest extent permitted by law, be operative against all future members of the Registration Board.

A judgment is sought declaring such past acts and practices of the Registration Board to be illegal under the Constitution and laws of the United States. Further, a judgment is sought enjoining the Registration Board from engaging in such illegal acts and practices in the future.

5. Defendant Grady Rogers became a member of the Registration Board in 1951 and he served in such capacity until his successor was appointed in 1955. Said Defendant Grady Rogers and Defendant E. P. Livingston became members of the current Registration Board in August 1956 and March 1957, respectively. In their official capacities these Defendants are and have been responsible for receiving applications to register to vote and for registering qualified applicants in Macon County, Alabama. Said Defendants, while discharging the duties of their offices, were and are acting under color of law of the State of Alabama. In the course of their official duties, said Defendants have discriminated against qualified Negro citizens on account of their race or color. A judgment is sought declaring such past acts and practices to be illegal

under the Constitution and laws of the United States. Further, an order is sought enjoining said Defendants, so long as they remain responsible for the duties of their office, and their successors, when appointed and qualified, from engaging in such illegal acts and practices in the future.

6. Defendants Grady Rogers and E. P. Livingston purported to resign as registrars in December 1958. Under applicable law, however, they are required to continue to perform duties and functions as registrars until their successors are appointed and have qualified.

7. Under the provisions of the statutes and the Constitution of the State of Alabama, registration is a prerequisite to voting at any election by the people in the State. The qualifications for registration are set forth in Appendix A hereof.

8. In the year 1958, the white citizens of voting age in Macon County, Alabama, numbered approximately 3100 and the Negro citizens of voting age numbered approximately 14,000. On or about December 1, 1958, the white citizens registered to vote in Macon County numbered approximately 3016 (or approximately 97% of the white population of voting age) and the Negro citizens registered to vote in Macon County numbered approximately 1110 (or approximately 8% of the Negro population of voting age).

9. The disparity between the respective percentages of white and Negro citizens of voting age registered to vote in Macon County, Alabama, as set forth in paragraph 8 hereof, has been brought about and is being perpetuated by racially discriminatory acts and practices of the Defendants as specified hereinafter.

Such acts and practices include, but are not limited to, the following:

(a) The maintenance of separate, discriminatory, registration facilities for Negroes;

(b) The failure and refusal to convene and function as a board of registrars in order to avoid receiving applications to register to vote from Negroes;

(c) The maintenance of irregular and unreasonable hours and use of other evasive schemes to avoid receiving and processing applications to register from Negroes;

(d) The application of different and more stringent registration standards to Negro than to white applicants;

(e) The failure to register qualified Negro applicants.

4 10. The Defendants have followed the practice, custom and usage of maintaining in the Macon County Courthouse a registration office for Negro applicants separate and apart from that maintained for white applicants, and have required all Negroes who have applied for registration to use only said separate and segregated office. Said practice, custom and usage has been followed by Defendant Registration Board for a long period of time and by Defendants Rogers and Livingston during their entire tenure of office.

11. The Defendants, for the purpose of preventing Negroes from registering, have on numerous occasions failed and refused to convene and to receive and act upon applications for registration for voting.

12. For the purpose of preventing Negroes from registering the Registration Board did not perform its functions and duties for substantial periods of time. Such periods of time and such failure to perform its functions and duties have included the following:

(a) From 1946 to January 1948, the Registration Board rendered itself inoperative by the purported resignations of its only two members.

(b) From April 1948 to January 1949 the Registration Board failed and refused to convene and discharge its duty of receiving applications for registration, notwithstanding the fact that said Registration Board throughout that period had at least a quorum.

(c) From January 1956 to August 1956 the Registration Board rendered itself inoperative by the purported resignation of one of its only two members.

(d) From March 1957 to June 1957 the Registration Board failed and refused to convene and discharge its duty

of receiving applications for registration, notwithstanding the fact that said Registration Board had its full complement of members.

(e) From December 1958 to the present the Registration Board rendered itself inoperative by the purported resignation of its only two members.

13. The Defendants have followed arbitrary and discriminatory practices, as between Negro and white applicants, in the operation of registration facilities, including but not limited to the following:

(a) Unreasonably delaying the admittance of Negro, but not of white persons, to the registration office;

(b) The holding of irregular and unreasonable hours for the receipt of applications of Negroes;

(c) The refusal to entertain applications of Negroes at normal business hours;

(d) The failure to convene the Board at the times announced;

(e) The closing of the registration office provided for Negro applicants while registering white applicants elsewhere;

(f) The failure to reveal the hours at which the applications of Negroes would be received;

(g) Unreasonably prolonging the registration process in the case of those Negroes who finally were admitted to the registration office.

14. The Defendants have followed the practice of applying different and more stringent standards to Negro than to white applicants for registration for voting in Macon County, Alabama, with respect to the requirements of Alabama law that applicants fill out a written questionnaire; that applicants be able to read and write any article of the United States Constitution; and that applicants otherwise comply with such rules and procedures as may be made and prescribed by the Registration Board.

15. The Defendants have refused, for reason of race or color, to register many of the qualified Negro citizens of Macon County who made proper application for registration, including the following:

(a) Daniel Webster Wynn, who has a Ph.D degree from Boston University.

(b) Fidelia Jo Anne Adams, who has a B.S. degree from Tuskegee Institute and is now working for an M.S. degree in Organic Chemistry at that institution.

(c) Mrs. K. Eaton Scott, who has a B.S. degree from North Carolina College, Durham, North Carolina.

(d) Leida Ruth Williams Davison, who has a B.S. degree from Alabama State College and is now working for a Master's Degree at Tuskegee Institute.

(e) Betty Alice H nderson, who has a B.S. degree from Miner Teachers College, Washington, D. C.

6 (f) John W. Jackson, Jr., who has a B.S. degree in Architecture from Tuskegee Institute.

(g) Charles Edward Miller, who has a B.S. degree in Business Administration from West Virginia State College.

(h) Doris Ezell Nearror, who has a B.S. degree in Nursing Education from Tuskegee Institute.

(i) Bettye J. Mindingall Ward, who is a high school graduate and a graduate nurse.

(j) Bettie B. Quinn, who is a high school graduate and a graduate nurse.

(k) Marie Williams, who is a high school graduate and has had 3½ years towards a degree at Tuskegee Institute.

(l) George C. Busby, Sr., who is a high school graduate and has attended the Washington University College of Business Administration.

(m) Roberta A. Lightfoot, who is a high school graduate and a graduate nurse.

(n) Lena Hayden Johnson, who is a high school graduate.

(o) Estelle Johnson, who is a high school graduate.

(p) Artemisia Jones Junier, who has a B.S. degree from Tennessee State College and a graduate degree in Library Science from Atlanta University.

(q) Llewellyn Wilbert Davis, who has an M.S. degree from Columbia University.

(r) Jordan Davis, who has an A.B. degree and a Bachelor of Divinity degree from Union University, Richmond, Virginia.

(s) Eugenia Cook Billes, who has an A.B. degree in Education from Southern University.

(t) Juanita H. Howard, who is a high school graduate.

16. By the acts and practices described in this complaint, the Defendants have violated the Constitution and the laws of the United States.

17. There are reasonable grounds to believe that the Defendant Registration Board, the Defendants Grady Rogers, E. P. Livingston (so long as they remain responsible for the duties of their office), their successors, and the agents and employees of said Defendants, for the purpose of depriving qualified Negroes of their
7 right to vote, will continue to engage in the illegal acts and practices set forth in this complaint, unless enjoined by this Court.

WHEREFORE, Plaintiff respectfully prays:

(a) that this Court adjudge, decree and declare that the following practices are in violation of the Constitution and laws of the United States, and that the Defendants are under the legal duty not to engage in such practices:

(1) The maintenance of racially segregated registration facilities (as averred in paragraph 10 hereof);

(2) The refusal of a board of registrars to convene or to receive or to act upon applications for registration for voting for the purpose of preventing Negroes from becoming registered voters (as averred in paragraph 11 hereof);

(3) The following of arbitrary and discriminatory practices as between Negro and white applicants for registration, including the practices of

(a) Unreasonably delaying the admittance of Negro, but not of white persons, to the registration office;

(b) The holding of irregular and unreasonable hours for the receipt of applications of Negroes;

(c) The refusal to entertain applications of Negroes at normal business hours;

(d) The failure to convene the Board at the times announced;

(e) The closing of the registration office provided for Negro applicants while registering white applicants elsewhere;

(f) The failure to reveal the hours at which the applications of Negroes would be received;

(g) Unreasonably prolonging the registration process in the case of those Negroes who finally were admitted to the registration office. (as averred in paragraph 13 hereof);

(4) The application of different and more stringent standards to Negro than to white applicants for registration for voting (as averred in paragraph 14 hereof);

(5) The failure to register qualified Negro applicants for registration for voting on account of their race or color (as averred in paragraph 15 hereof).

8 (b) That this Court issue a permanent injunction enjoining the Defendant Registration Board, and the Defendants Grady Rogers, E. P. Livingston, their successors, and the agents and employees of said Defendants, from:

(1) Maintaining separate offices for Negro and white applicants;

(2) Failing and refusing, on the grounds of race or color, to convene and function as a board of registrars;

(3) Using different facilities and procedures for registering Negro applicants from those used for white applicants;

(4) Failing or refusing, for reasons of race or color, to register the persons listed in paragraph 15 of this complaint and others similarly situated;

(5) Applying different and more stringent standards and rules to Negro applicants for registration than to white applicants in the administration of registration requirements provided by the constitution and laws of the State of Alabama;

(6) Engaging in any other acts, practices, methods or procedures in whatever form, whether by law, custom, or otherwise, which discriminate or tend to descriminate against any applicant for registration for voting in Macon County, Alabama, on account of his race or color.

(c) That this Court grant such additional relief as justice may require or as may be required in aid of the jurisdiction of this Court.

By direction of the Attorney General:

W. Wilson White
W. Wilson White
Assistant Attorney General

Hartwell Davis
Hartwell Davis
United States Attorney

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9 **Appendix A to Complaint**

Provisions of Alabama Law Respecting the Qualifications and Disqualifications for Registering to Vote

Section 32 of Title 17 of the Code of Alabama provides as follows:

> §32. Persons qualified to register.—The following persons, and no others, who, if they are citizens of the United States over the age of twenty-one years and have the qualifications as to residence prescribed in section 178 of the constitution [two years in the state, one year in the county, three months in the precinct or ward], shall be qualified to register as electors pro-

vided they shall not be disqualified under section 182 of the constitution; those who can read and write any article of the constitution of the United States in the English language which may be submitted to them by the board of registrars. No persons shall be entitled to register as electors except those who are of good character who embrace the duties and obligations of citizenship under the constitution of the United States and under the constitution of the state of Alabama.

Section 182 of the Constitution of the State of Alabama provides:

Section 182. The following persons shall be disqualified both from registering, and from voting, namely:

All idiots and insane persons; those who shall by reason of conviction of crime be disqualified from voting at the time of the ratification of this constitution; those who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crimes against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude; also, any person who shall be convicted as a vagrant or tramp, or of selling or offering to sell his vote or the vote of another, or of buying or offering to buy the vote of another, or of making or offering to make a false return in any election by the people or in any primary election to procure the nomination or election of any person to any office, or of suborning any witness or registrar to secure the registration of any person as an elector.

Section 31 of Title 17 of the Code of Alabama provides:

§31. Examination and oath of applicants to register. —The board of registrars shall have power to examine,

under oath or affirmation, all applicants for registration, and to take testimony touching the qualifications of such applicants. In order to aid the registrars to judicially determine if applicants to register have the qualifications to register to vote, each applicant shall be furnished by the board a written questionnaire, which shall be uniform in all cases with no discrimination as between applicants, the form and contents of which questionnaire shall be prescribed by the supreme court of Alabama and be filed by such court with the secretary of state of the state of Alabama. The questionnaire shall be so worded that the answers
11 thereto will place before the registrars information necessary or proper to aid them to pass upon the qualifications of each applicant. The questionnaire shall be answered in writing by the applicant, in the presence of the board without assistance. There shall be incorporated in such answer an oath to support and defend the constitution of the United States and the constitution of the state of Alabama and a statement in such oath by the applicant disavowing belief in or affiliation at any time with any group or party which advocated the overthrow of the government of the United States or the state of Alabama by unlawful means. The answers and oath shall be duly signed and sworn to by the applicant before a member of the board. Such questionnaire and the written answers of the applicant thereto shall be filed with the records of the board of registrars. If solely because of physical handicaps the applicant is unable to read or write, then he shall be exempt from the above stated requirements which he is unable to meet because of such physical handicap, and in such cases a member of the board shall read to the applicant the questionnaire and oaths herein provided for and the applicant's answers thereto shall be written down by such board member; and the applicant shall be registered as a voter if he meets all other requirements herein set out. Each member of the board is authorized to administer the oaths to be taken by the applicant and witnesses.

Section 33 of Title 17 of the Code of Alabama provides:

§33. Applicants may be refused.—Any person making application to the board of registrars who fails to establish by evidence to the reasonable satisfaction of the board of registrars that he or she is qualified to register, may be refused registration.

(File endorsement omitted)

12 Summons in a Civil Action

IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

Civil Action File No. 479-E

UNITED STATES OF AMERICA, *Plaintiff*

v.

THE BOARD OF REGISTRARS OF MACON COUNTY, ALABAMA; GRADY ROGERS, E. P. LIVINGSTON, REGISTRARS, *Defendants*

Summons and Marshal's Return—Filed February 9, 1959

To the above named Defendants:

You are hereby summoned and required to serve upon Hon. Hartwell Davis, United States Attorney plaintiff's attorney, whose address is Post Office Building, Montgomery Alabama, an answer to the complaint which is herewith served upon you, within Twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

R. C. DORSON
Clerk of Court.

ANNIE SCHOOLAR
Deputy Clerk.

[Seal of Court]

Date: February 6, 1959

Note: This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

13 RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 6th day of February 1959, I received this summons and served it together with the complaint herein as follows: on February 6, 1959 I served a copy thereof, with a copy of the complaint attached on Grady Rogers, by handing a copy to him in the Capitol Buildin Montgomery, Alabama at 10:30 AM.

CHARLES S. PRESCOTT
United States Marshal.

By JACK S. JOHNSON
Deputy United States Marshal.

this .....

Marshal's Fees
Travel .... $ .20
Service 2.00

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his Deputy.

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14 **Marshal's Return on Service of Writ**

(omitted in printing)

(File endorsement omitted)

15 Summons in a Civil Action

IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

Civil Action File No. 479-E

UNITED STATES OF AMERICA, *Plaintiff*

v.

THE BOARD OF REGISTRARS OF MACON COUNTY, ALABAMA; GRADY ROGERS, E. P. LIVINGSTON, REGISTRARS, *Defendants*

14

Summons and Marshal's Return—Filed February 9, 1959

To the above named Defendants:

You are hereby summoned and required to serve upon Hartwell Davis, United States Attorney, P. O. Building, Montgomery, Alabama, plaintiff's attorney, whose address is Post Office Building, Montgomery Alabama, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

R. C. Dobson
Clerk of Court.

R. E. Crory
Deputy Clerk.

[Seal of Court]

Date: February 6, 1959

Note: This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

15A RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 6th day of February 1959, I received this summons and served it together with the complaint herein as follows: on February 6, 1959 at 9:10 AM I served a copy thereof, with a copy of the complaint attached on the Attorney General, State of Alabama, by handing copy to Willard W. Livingston, Adm. Asst. to the Attorney General, Administrative Building, Montgomery, Ala.

Charles S. Prescott
United States Marshal.

By Jack S. Johnson
Deputy United States Marshal.

this

.....

Marshal's Fees
Travel .... $ .20
Service ... 2.00

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his Deputy.

(File endorsement omitted)

16 IN UNITED STATES DISTRICT COURT

UNITED STATES DEPARTMENT OF JUSTICE

Appearance—Filed February 12, 1959

UNITED STATES ATTORNEY
MIDDLE DISTRICT OF ALABAMA
MONTGOMERY, ALA.

February 12, 1959

In reply refer to
style of case and
JMFR:hs

Mr. R. C. Dobson
Clerk, U. S. District Court
Middle District of Alabama
Montgomery, Alabama

Re: United States of America v.
The Board of Registrars of
Macon County, Alabama; Grady
Rogers, E. P. Livingston, Registrars
Civil Action No. 479-E

Dear Mr. Dobson:

Will you kindly enter my appearance in the above styled litigation as an attorney for the Plaintiff, United States of America.

Yours very truly,

JOSEPH M. F. RYAN, JR.
Joseph M. F. Ryan, Jr.
Attorney, Department of Justice

16

(File endorsement omitted)

17 IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

(Title omitted)

Plaintiff's Motion to Produce and to Permit the Inspection, Copying and Photographing of Records Under Rule 34, Federal Rules of Civil Procedure—Filed February 12, 1959

1. Comes now the United States of America, by its attorneys, and moves this Court for an order directing the defendants herein to produce and to permit the inspection, copying, and photographing of the following records, documents and papers, and directing the defendants not to destroy or to transfer possession, custody, or control of such records, documents and papers at any time prior to the completion of the requested inspection:

(a) All applications for registration, and all questionnaires and oaths relating to such applications or registrations, received by the Macon County Board of Registrars since January 1, 1954.

(b) All records and documents made or received by the Macon County Board of Registrars since January 1, 1954, relating to or reflecting the ability of applicants for registration to read and write any article of the Constitution of the United States in the English language (as prescribed by section 32, Title 17, Code of Alabama, 1940).

18 (c) Copies of any rules and regulations made by the Macon County Board of Registrars regarding registration (in accordance with section 53, Title 17, Code of Alabama, 1940).

(d) All other records, documents, or papers which have been made or received by the Macon County Board of Registrars since January 1, 1954, concerning the qualifications for voting of any applicant for registration.

2. The defendants herein have possession, custody, or control of each of the foregoing records, documents, and papers, as is more fully shown in Exhibit A, attached hereto and incorporated herein by reference.

3. The foregoing records, documents, and papers are material and relevant to the subject matter involved in this action, as is more fully shown in Exhibit A, attached hereto and incorporated herein by reference.

4. There is a necessity that this Court specifically insure the availability of the foregoing records, documents and papers, as is more fully shown in Exhibit A, attached hereto and incorporated herein by reference.

5. There is a necessity that this matter be disposed of speedily, as is more fully shown by Exhibit A, attached hereto and incorporated herein by reference.

WHEREFORE the premises considered it is respectfully moved that this Court

(a) set this motion down for an immediate hearing;

(b) issue an appropriate order requiring the defendants to preserve and produce for inspection, copying and photographing the records, documents and papers described in paragraph 1 (a) through (d) hereof;

19 (c) grant such further relief as will protect the jurisdiction of this Court and the rights of the plaintiff in this matter and as the interests of justice may require.

W. WILSON WHITE
W. Wilson White
Assistant Attorney General

HARTWELL DAVIS
Hartwell Davis
United States Attorney

JOSEPH M. F. RYAN, JR.
Joseph M. F. Ryan, Jr.
Attorney, Department of Justice

CERIFICATE OF SERVICE

(omitted in printing)

---

20 **Exhibit A to Plaintiff's Motion, etc.**

District of Columbia, SS

I, Joseph M. F. Ryan, Jr., being duly sworn according to law depose and say as follows:

1. That I am an attorney of record for plaintiff in the instant case of United States v. Board of Registrars of Macon County, Alabama et al., and that I am familiar with the complaint and the motion filed in said cause and with the facts underlying such complaint and such motion.

2. That defendants Grady Rogers and E. P. Livingston were appointed in and have served as members of the current Board of Registrars of Macon County, Alabama since August 1956 and March 1957 respectively.

3. That on or about December 11, 1958 said defendants, Grady Rogers and E. P. Livingston purported to resign as registrars of Macon County, Alabama, but under applicable law such purported resignations are not effective to divest them of continuing responsibility for the conduct of office and the safekeeping of documents, records, and papers of such office until their successors are appointed, and qualified. As of this date no such successors have been appointed.

4. That defendants pursuant to the provisions of Title 17, section 31, Code of Alabama, 1940, make and keep the records, documents, and papers pertaining to the conduct of the business of the Board of Registrars of Macon County, Alabama.

5. That by virtue of the obligations of said defendants mentioned in paragraphs 3 and 4, the documents, records, and papers sought for production, inspection, copying and photographing in plaintiff's motion are in the possession, custody or control of defendants.

21 6. That the registration records, documents, and papers sought by plaintiff's motion and described

therein constitute or contain evidence relating to matters which are relevant to the subject matter of the pending action, United States v. Board of Registrars of Macon County, Alabama, et al., in that said action alleges certain racially discriminatory acts and practices of defendants with respect to registration for voting and the records sought are needed by the plaintiff effectively to demonstrate this pattern of discrimination.

7. That on or about December 2, 1958, the Commission on Civil Rights, an independent agency of the federal Government, issued and served subpoenas for the production of certain voting records in the possession, custody, or control of defendants herein for use in a Commission hearing held on December 8, 1958 in Montgomery, Alabama.

8. That on or about December 8, 1958 defendants Grady Rogers and E. P. Livingston purported to relinquish custody of such records to the Circuit Solicitor of the Fifth Judicial Circuit of Alabama, which includes Macon County, Alabama, thereby attempting to place themselves in a position of being unable to produce the said records in accordance with the said subpoenas described in paragraph 7.

9. That on or about January 6, 1959, defendants Grady Rogers and E. P. Livingston pursuant to the order of this Court in Civil Action No. 1487-N entered January 5, 1959 produced the records of the Board of Registrars of Macon County to agents of the Commission on Civil Rights. Said records were at that time located in the courthouse of Macon County, Alabama.

22 10. That in connection with the hearing by the Commission on Civil Rights mentioned in paragraph 7 the Attorney General of the State of Alabama, presently the Governor of the State, advised members of the Board of Registrars in Macon County and other counties in the State of Alabama to withhold from the federal Government all records pertaining to voting and registration for voting.

11. That there is presently pending in the legislature of the State of Alabama a proposal to authorize Boards of Registrars to destroy voting registration records relating to unsuccessful applicants for registration. Such proposal

has been endorsed by the Governor and approved by the Privileges and Election Committee of the Senate of the State of Alabama. Its enactment appears imminent.

12. That all of the voting and registration records of Macon County sought by this motion including those of unsuccessful applicants are necessary for the preparation and presentation of the case in United States v. Board of Registrars of Macon County, Alabama, et al., and that any relinquishment of control which precludes access to the records sought or destruction of said records would substantially affect the ability of the plaintiff to present to the Court the evidence necessary to prove the cause herein.

13. That in view of the facts alleged in paragraph 8 and in view of the pending legislation described in paragraph 10, and in order to insure plaintiff the right to inspect the records described in the motion it is necessary that this Court expedite a hearing on this motion and cause such hearing to be set down for argument immediately.

JOSEPH M. F. RYAN, JR.
Joseph M. F. Ryan, Jr.

Subscribed and sworn to before me this 11th day of February, 1959

LOUIS E. MCDONOUGH
Notary Public
My Commission Expires July 31, 1962

(Seal)

(File endorsement omitted)

23 IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

Civil Action No. 479-E

(Title omitted)

**Motion for Temporary Restraining Order—
Filed February 12, 1959**

Comes now the plaintiff in the above entitled matter, the United States of America, and shows unto the Court as follows:

1. That heretofore on February 12, 1959, plaintiff filed in this cause a Motion to Produce under Rule 34, Federal Rules of Civil Procedure, herein incorporated by reference, seeking the production of certain voter registration records of the Board of Registrars of Macon County, Alabama, which are more fully particularized in said Motion and such records constitute or contain evidence which is relevant to the subject matter in this cause.

2. That any destruction, removal or dissipation of any of said records would substantially affect and injure the ability of the plaintiff to present to the Court necessary material and relevant evidence in the cause herein, thereby causing irreparable injury to the rights of certain citizens of the State of Alabama in whose behalf it is the duty and obligation of the United States to protect by appropriate action in the Federal Courts pursuant to the Civil Rights Act of 1957.

3. That on February 11, 1959, the Senate of the legislature of the State of Alabama in an action reportedly indorsed by the Governor by a unanimous vote passed a bill which provides for the destruction of records, which would include the very records which are the subject matter of the Motion to Produce herein. A copy of said bill, SB-18, as passed is attached hereto as Exhibit A.

4. That the publicly stated purpose of the aforesaid bill is to deprive the Government of the United States acting through its Courts or agencies of access to such records.

24 5. That the enactment of such bill into law appears to be imminent.

6. That to preserve the status quo pending a hearing on the Motion to Produce heretofore filed by plaintiff and in order to save the plaintiff from irreparable injury as described herein in paragraph 2, it is necessary that an order issue from this Court, without notice, restraining defendants, their agents, attorneys, associates, employees or any person or persons acting for and through them, from destroying, mutilating, damaging, removing or otherwise rendering such records unavailable.

HARTWELL DAVIS
Hartwell Davis
United States Attorney

JOSEPH M. F. RYAN, JR.
Joseph M. F. Ryan, Jr.
Attorney,
Department of Justice

Duly sworn to by Joseph M. F. Ryan, Jr.
jurat omitted in printing

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25 **Exhibit "A"—to Motion for Temporary Restraining Order**

Substitute for S.B. 18 and Committee Amendments—
By Givhan

A BILL
TO BE ENTITLED
AN ACT

To amend further Section 31 of Title 17, Code of Alabama 1940, relating to examinations of applicants to register.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. Section 31, Title 17, Code of Alabama 1940, as amended by Act No. 754, Acts of 1953, is amended further to read as follows:

"Section 31. The board of registrars shall have power to examine, under oath or affirmation, all applicants for

registration, and to take testimony touching the qualifications of such applicants. In order to aid the registrars to judicially determine if applicants to register have the qualifications to register to vote, each applicant shall be furnished by the board a written questionnaire, which shall be uniform in all cases with no discrimination as between applicants, the form and contents of which questionnaire shall be prescribed by the Supreme Court of Alabama and be filed by such Court with the Secretary of State of the State of Alabama. The questionnaire shall be so worded that the answers thereto will place before the registrars information necessary or proper to aid them to pass upon the qualifications of each applicant. The questionnaire shall be answered in writing by the applicant, in the presence of the board without assistance. There shall be incorporated in such answer an oath to support and defend the Constitution of the United States and the Constitution of the State of Alabama and a statement in such oath by the applicant disavowing belief in affiliation at any time with any group or party which advocated the overthrow of the government of the United States or the State of Alabama by unlawful means. The answers and oath shall be duly signed and sworn to by the applicant before a member of the Board. If solely because of physical handicaps the applicant is unable to read or write, then he shall be exempt from the above stated requirements which he is unable to meet because of such physical handicap, and in such cases a member of the board shall read to the applicant the questionnaire and oath herein provided for and the applicant's answers thereto shall be written down by such board member; and the applicant shall be registered as a voter if he meets all other requirements herein set out. Each member of the board is authorized to administer the oaths to be taken by applicants and witnesses. The questionnaires and written answers of persons applying for registration shall not become public records as public records are defined under the laws of the State of Alabama, nor shall the board disclose the information contained in such questionnaires and written answers except with the written consent of the person who filed the answer or pursuant to the order of a court of competent jurisdiction in a proper proceeding. Such questionnaires and the answers of applicants

shall be preserved by the board for a period of thirty days, after denial after which, if no appeal has been taken as provided in Section Thirty-Five of this Title, they shall be kept with the records of the board of registrars or disposed of in such manner as the board may direct."

Section 2. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

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26 **Marshal's Returns on Service of Writ**

(Omitted in printing).

(File endorsement omitted)

29 IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

Civil Action No. 479-E

(Title omitted)

Temporary Restraining Order—February 12, 1959

This cause came on to be heard on plaintiff's verified motion for temporary restraining order pending disposition of a motion to produce heretofore filed by plaintiffs, said restraining order being sought by the plaintiff without notice because of alleged immediate and irreparable injury and loss or damage to plaintiff:

1. It appears that on or about February 5, 1959, the United States filed in this court a complaint seeking a permanent injunction against defendants herein, enjoining said defendants from engaging in racially discriminatory acts or practices relating to voting qualifications in violation of the Constitution and laws of the United States.

2. That it further appears that plaintiff has filed in this court a motion to produce, pursuant to Rule 34, Federal Rules of Civil Procedure, certain voting records in the possession, custody or control of defendants, which

constitute or contain evidence which is relevant to the subject matter of this action and it further appears that such records are necessary for the presentation of this cause.

3. It further appears that any destruction, mutilation, damaging, removing or otherwise rendering unavailable any such records would substantially affect and injure plaintiff's ability to present to the court the evidence necessary to prove this cause, thereby causing irreparable injury to the right of certain citizens of the State of Alabama in whose behalf it is the duty and obligation of the United States to protect by appropriate action in the Federal Courts pursuant to the Civil Rights Act of 1957.

4. It further appearing that on February 11, 1959, the Senate of the Legislature of the State of Alabama in an action reportedly indorsed by the Governor by a unanimous vote passed a bill which provides for the destruction of records, which would include the very records which are the subject matter of the motion to produce herein.

5. It further appearing that the publicly stated purpose of the aforesaid bill is to deprive the Government of the United States acting through its Courts or agencies of access to such records.

6. It further appearing that the enactment of such bill into law appears to be imminent.

It further appearing that a restraining order, preliminary to the hearing on plaintiff's motion to produce, should issue without further notice because immediate irreparable injury may result to the plaintiff before notice can be served or hearing had thereon,

THEREFORE, it is the ORDER, JUDGMENT and DECREE of the Court that the defendants, their agents, attorneys, associates, employees and all persons acting by, through, or under them, be and they are hereby restrained until the further order of this court from destroying, mutilating, damaging, removing or otherwise rendering unavailable the following records, papers and documents:

A. All applications for registration, and all questionnaires and oaths relating to such applications or registrations, received by the Macon County Board of Registrars since January 1, 1954.

B. All records and documents made or received by the Macon County Board of Registrars since January 1, 1954, relating to or reflecting the ability of applicants for registration to read and write any article of the Constitution of the United States in the English language (as prescribed by Section 32, Title 17, Code of Alabama, 1940).

C. Copies of any rules and regulations made by the Macon County Board of Registrars regarding registrations (in accordance with Section 53, Title 17, Code of Alabama, 1940).

D. All other records, documents, or papers which have been made or received by the Macon County Board of Registrars since January 1, 1954, concerning the qualifications for voting of any applicant for registration.

The United States Marshal is directed to serve an attested copy of this order forthwith on each of the defendants.

Done at 5:00 o'clock P.M., this 12th day of February 1959.

FRANK M. JOHNSON, JR.
Frank M. Johnson, Jr.,
United States District Judge

32 **Marshal's Returns on Service of Writ**

(Omitted in printing)

(File endorsement omitted)

35 IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

(Title omitted)

Order Setting Hearing on Plaintiff's Motion to Produce—February 13, 1959

The plaintiff in this cause, the United States of America, having heretofore filed a Motion to Produce under Rule 34 of the Federal Rules of Civil Procedure, for the production, inspection, copying and photographing of certain voter registration records in the custody or control of the defendants, it is

ORDERED, ADJUDGED, and DECREED that said Motion be and the same is hereby set down for hearing by this Court on February 23, 1959, at 10:00 A.M. in the Courtroom, Montgomery, Alabama.

The Clerk of this Court is directed to serve a copy of this order to all parties to this cause.

Done this 13th day of February, 1959.

FRANK M. JOHNSON, JR.
Frank M. Johnson, Jr.
United States District Judge

35A **Attachment to Order**

UNITED STATES DISTRICT JUDGE'S CHAMBERS
MIDDLE DISTRICT OF ALABAMA
MONTGOMERY 1, ALABAMA

FRANK M. JOHNSON, JR.
DISTRICT JUDGE

February 16, 1959

Mr. Joseph M. F. Ryan, Jr.
Attorney, Civil Rights Division
Department of Justice
Washington 25, D. C.

Mr. E. P. Livingston
Notasulga, Alabama

Mr. Hartwell Davis
United States Attorney
Federal Building
Montgomery, Alabama

Mr. Grady Rogers
Route 1
Tuskegee, Alabama

Mr. MacDonald Gallion
The Attorney General
State of Alabama
Montgomery, Alabama

Re: United States of America vs. The Board of Registrars of Macon County, Alabama; Grady Rogers, E. P. Livingston, Registrars
Civil Action No. 479-E

Gentlemen:

The above-styled case is set on Tuesday, March 3, 1959, at 2:00 p.m., in chambers in Opelika, Alabama, for the purpose of a pre-trial hearing as provided by Rule 16 of the Rules of Civil Procedure for the District Courts of the United States.

This hearing will be addressed to consideration of the matters provided for in Rule 16. All parties should prepare and submit to the other parties prior to this hearing any necessary or desirable amendments or additions to the pleadings. All parties should also prepare and have ready all possible admissions of fact and of documents which might avoid unnecessary proof upon trial, and should consider the possibility of limitation of the number of

expert witnesses, the advisability of a reference to a special master, and any other matters that might aid in the disposition of the action.

All motions will be heard at the above-stated time.

It is necessary that the attorneys who are to try this case appear at the time above designated, and be fully prepared to state the facts of the case in the most minute detail, and to admit all facts that are true. Failure to comply with these requirements will receive appropriate penalties.

By direction of Honorable Frank M. Johnson, Jr., United States District Judge.

Yours very truly,

.....

Secretary.

35B **Attachment to Order**

February 19, 1959

Hon. Joseph M. F. Ryan, Jr.
Attorney, Civil Rights Division
Department of Justice
Washington 25, D. C.

Hon. Hartwell Davis
United States Attorney
Montgomery, Alabama

Hon. MacDonald Gallion
The Attorney General
State of Alabama
Montgomery, Alabama

Hon. Lawrence K. Andrews
Attorney at Law
Union Springs, Alabama

Re: U. S. v. The Board of Registrars et al—
Civil No. 479-E

SET FOR TRIAL THURSDAY, MARCH 19, 1959,
AT 10:00 A.M.

Re: United States of America vs. The Board of Registrars of Macon County, Alabama; Grady Rogers, E. P. Livingston, Registrars Civil Action No. 479-E

Gentlemen:

I am informed by the Honorable Hartwell Davis, United States Attorney for this district, that all the attorneys in the above-captioned matter have agreed that the venue for this cause be changed from the Eastern division in Opelika, Alabama, to the Northern division here in Montgomery, Alabama. Such a change is satisfactory with this Court. You may, therefore, disregard the pre-trial notice forwarded to you dated February 16, 1959, which notice advised you that this matter was set in Opelika, Alabama, on March 3, 1959, at 2 p.m., for the purpose of a pre-trial hearing.

Since, by agreement, the case is to be heard for all purposes here in Montgomery, Alabama, you are informed that the pre-trial hearing will be Thursday, March 5, 1959, commencing at 10:00 a.m., in chambers here in Montgomery, Alabama.

Very truly yours,

FRANK M. JOHNSON, JR.
United States District Judge

(File endorsement omitted)

36 IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA, EASTERN DIVISION

Civil No. 479-E

(Title omitted)

Notice of Intention to Take Oral Testimony—Filed February 20, 1959

Plaintiff, United States of America, gives notice that it intends to take oral testimony at the Hearing on the Motions and other Pleadings set for February 23, 1959.

Dated this 20th day of February 1959.

HARTWELL DAVIS
Hartwell Davis,
United States Attorney

CERTIFICATE OF SERVICE

(Omitted in printing)

(File endorsement omitted)

37 IN THE UNITED STATES DISTRICT COURT

(Title omitted)

Motion to Dissolve the Temporary Restraining Order—Filed February 20, 1959

Come respondents, Grady Rogers and E. P. Livingston, personally and in their individual capacity only, and in no other capacity, and admit service on them as individuals and admit jurisdiction of this Court on them as individuals, but as individuals only, and appearing specially for the purposes of this motion and without admission of jurisdiction or authority of this Court over them in a representative capacity or over the Board of Registrars of Macon County, Alabama, or the State of Alabama, and move that the temporary restraining order heretofore issued by this Court be dissolved or set aside and dismissed, and in support thereof show the following facts and grounds:

1. Neither of them are in possession of the records, documents and papers mentioned in the restraining order; that they do not have access to said records or control over them and they cannot produce them even if commanded to do so; that they cannot destroy, mutilate, damage, remove or otherwise render such records unavailable to this Court; all as is more fully shown in Exhibits A and B, attached hereto and incorporated herein by reference.

2. That they do not have the power or authority over said records to destroy, mutilate, damage, remove
38 or otherwise render such records unavailable to this Court, nor do they have the actual physical

control or possession of said records which might enable them to do so.

3. That they have no intention of mutilating, damaging, removing or otherwise rendering such records unavailable to this Court.

4. That they have vacated the office as members of the Board of Registrars of Macon County, Alabama, and that they had done so prior to the institution of this suit and prior to any service of process upon them; that they have no intention of and do not propose to serve again as members of the Board of Registrars of Macon County, Alabama; that they resigned as members of the Board of Registrars of Macon County, on to wit, December 10, 1958, that said office was vacated; that their resignation was in writing and unconditional and is effective and has been accepted; that moreover the appointing authority has removed them from the said office; that each has qualified for, and begun to serve in, another State office, which automatically, or ipso facto, removes them from the first office, viz., the office of members of the Board of Registrars of Macon County, Alabama.

5. That the matter is moot.

6. That the matter is moot for the additional reason that the plaintiff has already had access to the records and it is understood that they photographed same.

7. That this injunction was sought only for embarrassment, publicity or other improper reasons.

8. This Court is asked to indulge in speculation as to what the Legislature of Alabama may pass.

9. The injunction is premature.

10. The matter is moot on its face in this: Senate Bill 18, referred to in the motion for the temporary restraining order, and upon which the plaintiff bases its prayer for temporary injunction, shows on its face that the bill would authorize the Board of Registrars to dispose of the records in such manner as the Board may direct; therefore, it requires action of a Board not of an

individual; and furthermore the Board cannot act unless the action is taken by a majority thereof.

Respectfully submitted,

For Grady Rogers and E. P. Livingston

By—

L. P. Andress
Attorney

MacDonald Gallion
Attorney General,
State of Alabama

N. S. Hare
Sp. Ass't Atty Gen.

Certificate of Service

(Omitted in printing)

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40 **Exhibit A1.—to Motion, etc.**

State of Alabama.

I, E. P. Livingston, being duly sworn according to law, depose and say as follows:

Boards of Registrars in Alabama are composed of three members. The members of the Board of Registrars of Macon County, prior to December 10, 1958, were Grady Rogers and E. P. Livingston, the third member having died. On December 8, 1958, Grady Rogers and E. P. Livingston physically delivered all the records of the Board of Registrars of Macon County, Alabama, and turned them over to the Sheriff of Macon County, Alabama, the Honorable Preston Hornsby; that at that time the said Sheriff was custodian of the Court House of Macon County, Alabama; that E. P. Livingston was served with a subpoena duces tecum (copy attached, marked B), and in response thereto the records were turned over to the Sheriff and physically delivered to him for safe keeping and preservation and/or transmission to the Judge of Probate, Circuit Solictor or such other official charged by law to preserve or act as custodian of such records; that

deponent understands that said records are stored in the Macon County Court House in a locked room or container and that the said Sheriff or the solicitor have the keys thereo; deponent says that he has no keys thereto; that he does not have custody of said records or access to them; that he does not have possession of same and that even if the Court ordered him to produce them, he could not comply with such an order; that the last official act of this deponent as a member of the Board of Registrars of Macon County, Alabama, was to give up possession of said records as aforesaid, and since that time and since dependent's
41 resignation as a member of said Board of Registrars, the deponent has had no custody or control over said records or anything to do with them. Deponent further states that on December 10, 1958, he resigned as a member of the Board of Registrars of Macon County, absolutely and unconditionally, by written resignation delivered to the Appointing Board; that said resignation was in good faith and further that deponent does not intend to serve again as a member of the Board of Registrars; that said resignation has been accepted by the Appointing Board; that additionally the Appointing Board has notified him that he has been removed therefrom; that deponent has accepted, qualified and begun serving in another public office for profit, which of itself automatically vacates any prior office, viz., that of member of the Board of Registrars of Macon County, Alabama; that at the time this suit was filed and at the time of the service of process, deponent was not acting in any representative capacity for said Board of Registrars; was not a member thereof and had no authority or connection whatever with said Board of Registrars. Deponent further states that he does not have the power, legal or actual, to destroy, mutilate, damage or remove any of said records and has no intention of doing so.

E. P. LIVINGSTON
Affiant

Sworn to and subscribed before me on this the 20th day of February 1959.

IDA LEE DOZIER
Notary Public

(Seal)

STATE OF ALABAMA.

I, Grady Rogers, being duly sworn according to law, depose and say as follows:

Boards of Registrars in Alabama are composed of three members. The members of the Board of Registrars of Macon County, prior to December 10, 1958, were Grady Rogers and E. P. Livingston, the third member having died. On December 8, 1958, Grady Rogers and E. P. Livingston physically delivered all the records of the Board of Registrars of Macon County, Alabama, and turned them over to the Sheriff of Macon County, Alabama, the Honorable Preston Hornsby; that at that time the said Sheriff was custodian of the Court House of Macon County, Alabama; that E. P. Livingston was served with a subpoena duces tecum (copy attached, Marked B), and in response thereto the records were turned over to the Sheriff and physically delivered to him for safe keeping and preservation and/or transmission to the Judge of Probate, Circuit Solicitor or such other official charged by law to preserve or act as custodian of such records; that deponent understands that said records are stored in the Macon County Court House in a locked room or container and that the said Sheriff or the solicitor have the keys thereto; deponent says that he has no keys thereto; that he does not have custody of said records or access to them; that he does not have possession of same and that even if the Court ordered him to produce them, he could not comply with such an order; that the last official act of this deponent as a member of the Board of Registrars of Macon County, Alabama, was to give up possession of said records as aforesaid, and since that time and since deponent's
43 resignation as a member of said Board of Registrars, the deponent has had no custody or control over said records or anything to do with them. Deponent further states that on December 10, 1958, he resigned as a member of the Board of Registrars of Macon County, absolutely and unconditionally, by written resignation delivered to the Appointing Board; that said resignation was in good faith and further that deponent does not intend to serve again as a member of the Board of

Registrars; that said resignation has been accepted by the Appointing Board; that additionally the Appointing Board has notified him that he has been removed therefrom; that deponent has accepted, qualified and begun serving in another public office for profit, which of itself automatically vacates any prior office, viz., that of member of the Board of Registrars of Macon County, Alabama; that at the time this suit was filed and at the time of the service of process, deponent was not acting in any representative capacity for said Board of Registrars; was not a member thereof and had no authority or connection whatever with said Board of Registrars. Deponent further states that he does not have the power, legal or actual, to destroy, mutilate, damage or remove any of said records and has no intention of doing so.

GRADY ROGERS
Affiant

Sworn to and subscribed before me on this the 20th day of February 1959.

IDA LEE DOZIER
Notary Public

(Seal)

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44 **Exhibit B—to Motion, etc.**

Subpoena Duces Tecum

THE STATE OF ALABAMA, MACON COUNTY

CIRCUIT COURT

To any Sheriff of the State of Alabama—Greeting:

You are hereby commanded to summon E. P. LIVINGSTON at the instance of Tom F. Young, Circuit Solicitor of 5th Judicial Circuit if he shall be found in your County, personally to be and appear before the said Circuit Solicitor of said County at the Courthouse at Tuskegee, Alabama in and for said County, to-wit: On the 9th day of December 1958, and to bring with him and produce at the time and place aforesaid, to be used as evidence certain instruments of writing, purporting to be All Records, Books and Dossiers pertaining to and maintained by him as Member of the Board of Registrars for Macon County,

Alabama, bearing date to date, in the year of our Lord One Thousand Nine Hundred and Fifty-Eight, then and there to testify, and the truth to speak, concerning all and singular those things of which he may have knowledge, or the said instrument of writing doth import of, and concerning a certain cause now pending and undetermined in the said County wherein State of Alabama, is Plaintiff, and John Doe, Alias, is Defendant. And this he shall in nowise omit, under penalty of what the law directs: and have you then and there this Writ, with an indorsement thereon in what manner you shall have executed the same.

Witness, ..., this 3rd day of December, 1958.

s/
Circuit Solicitor,
Macon County, Ala.

Code 1940, Tit. 7, Sec. 485

(File endorsement omitted)

45 IN UNITED STATES DISTRICT COURT

(Title omitted)

Answer to or Objection to the Motion to Produce—Filed February 20, 1959

Appearing specially for the purpose of this objection and without admitting jurisdiction, come Grady Rogers and E. P. Livingston, individually, in response to the motion to produce and to permit the inspection, copying and photographing of records under Rule 34, Federal Rules of Civil Procedure, heretofore filed in this cause by the plaintiff and for answer to or objection to the said motion of the plaintiff, set down and assign the following grounds, separately and severally, as to Grady Rogers and E. P. Livingston separately and severally:

1. Grady Rogers and E. P. Livingston resigned as members of the Board of Registrars of Macon County, Alabama, prior to the institution of this suit and prior to the service of said motion upon them and they do not propose to serve again; that said resignation was in good faith and they have no intention of functioning again in

said capacity, all as is more fully shown by Exhibits A and B, attached hereto and incorporated herein by reference.

2. Grady Rogers and E. P. Livingston have had no official connection and no authority in respect to the said Board of Registrars, since to wit, December 10, 1958.

3. Grady Rogers and E. P. Livingston do not have possession of the records requested and are unable to comply with said motion even if it were granted.

46 4. Grady Rogers and E. P. Livingston do not have custody or control of said records and have not had said custody or control since to wit, December 8, 1958, when said records were physically turned over to and delivered to the Honorable Preston Hornsby, as Sheriff of Macon County, Alabama, who at that time was the custodian of the Court House of Macon County, Alabama. Said records were then turned over to him and physically delivered to him for safe keeping and preservation and/or for transmission to the Judge of Probate, Circuit Solicitor or such other official charged by law to preserve or act as custodian of such records and in response to a subpoena duces tecum, copy of which is attached hereto and incorporated herein as Exhibit B. Grady Rogers and E. P. Livingston state that that was the last official act of theirs in their capacity as members of the Board of Registrars of Macon County, Alabama.

5. They do not have access to said records.

6. That the Board of Registrars of Macon County, Alabama, has no servants, agents or employees and does not exist except through its members, and it cannot deliver any records.

7. They deny that they are now members or agents of the Board of Registrars of Macon County, Alabama, or have been since prior to service of process and prior to the institution of this action.

8. Under the law of Alabama, said records are required to remain in Macon County, and this motion seeks to have parties produce said records in Montgomery, Alabama, which would require the parties violate the law.

9. It appears that the plaintiff has already had access to said records and photographed such of them as is material to their action.

47 10. That this motion is made for embarrassment, vexation or other improper reasons.

Respectfully submitted,

For GRADY ROGERS and E. P. LIVINGSTON

By—

L. P. ANDRESS
Attorney

MACDONALD GALLION
Attorney General,
State of Alabama

N. S. HARE
Sp. Ass't Atty Gen.

CERTIFICATE OF SERVICE

(Omitted in printing)

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48 **Exhibit A.1.—Affidavit of E. P. Livingston**

(Omitted. Printed side page ~~40~~ 33 supra)

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50 **Exhibit A.2.—Affidavit of Grady Rogers**

(Omitted. Printed side page ~~42~~ 35 supra)

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52 **Exhibit B—Subpoena**

(Omitted. Printed side page ~~44~~ 36 supra)

(File endorsement omitted)

53 IN UNITED STATES DISTRICT COURT

(Title omitted)

Motion to Strike and to Quash—Filed February 20, 1959

Now comes Grady Rogers and E. P. Livingston, separately and severally, appearing specially for the pur-

pose of this motion and for no other purpose and without admitting the jurisdiction of the Court and move the Court to quash the service or the purported service upon them by the United States Marshal of various papers in this cause. Movants admit jurisdiction of this Court on them as individuals, but as individuals only and not in any representative capacity, and movants set out the following facts and assign the following grounds, separately and severally:

A. Statement of Facts Relative to Return

It appears that there has been no service or attempted service of the complaint on the "Board of Registrars of Macon County, Alabama" as such; yet it does appear that such attempted service has been made in respect to the motion for a temporary restraining order and of the temporary restraining order.

The return made by the United States Marshal relative to service of the complaint is as follows:

> "I hereby certify and return that on the 6th day of February 1959, I received this summons and served it together with the complaint herein as follows: On February 6, 1959, I served a copy thereof, with a copy of the complaint attached on Grady Rogers, by handing a copy to him in the Capitol Building, Montgomery, Alabama, at 10:30 A.M."

And

54 > "I hereby certify that I served and annexed Summons and Complaint on the therein named E. P. Livingston by handing to and leaving a true and correct copy thereof with him personally at City Hall at Notasulga, Ala. at 9:30 A.M., the 6th day of February 1959."

The return made by the United States Marshal relative to service of the motion for the temporary restraining order and the temporary restraining order is as follows:

> "I hereby certify and return that I served the annexed order on the therein-named Grady Rogers, by handing to and leaving a true and correct copy thereof

with him personally at R.F.D., at Tuskegee, Alabama, in the said District at 5:15 P.M., on the 13th day of February 1959."

And

"I hereby certify and return that I served the annexed order on the therein-named E. P. Livingston, by handing to and leaving a true and correct copy thereof with him personally at City Hall, Notasulga, Alabama, in the said District, at 3:30 P.M., on the 13th day of February, 1959."

And

"I hereby certify and return that I served the annexed order on the therein-named The Board of Registrars of Macon County, by handing to and leaving a true and correct copy thereof with E. P. Livingston, Registrar, personally at City Hall, at Notasulga, Alabama, in said District, at 3:30 P.M., on the 13th day of February 1959."

B. Statement of General Facts

Movants show this Court that heretofore on, to wit, the 10th day of December 1958, and prior to the institution of this suit and prior to the purported service mentioned herein, movants resigned in good faith as members of the Board of Registrars of Macon County, Alabama, and vacated such office; that since said date movants have had no connection with the said Board of Registrars of Macon County, Alabama, and have not been authorized to act as agents or otherwise, nor have movants acted or attempted to act in any official capacity, as members of said Board of Registrars. Movants further show that prior to their resignation on December 10, 1958, as aforesaid, they did, on to wit, December 8, 1958, turn over and physically deliver all of the records then in the possession of the Board of Registrars of Macon County, Alabama, to the Honorable Preston Hornsby, as Sheriff of Macon County, Alabama; that the said Sheriff was at that time the custodian of the Macon

County Courthouse and that said records were, by your movants, then turned over to and physically delivered to him in response to a Subpoena Duces Tecum (copy attached, Marked Exhibit "B") for safe keeping and/or transmission by him to the Probate Judge or the Circuit Solicitor or such other official charged by law to act as custodian of or to preserve such records; and that since December 10, 1958, the date of movants resignation, as aforesaid, movants have not been in possession of or had access to the records involved in this case; and your movants further allege they are without authority to accept service of process related to said Board of Registrars or to function in any official capacity for said Board of Registrars and are without authority to deliver to any person any of said records or to destroy, mutilate, damage, or remove said records and that your movants have no such intention of so doing, all of which is more fully shown in Exhibit "A", attached hereto and incorporated herein by reference.

C. Grounds for Motion

And as further grounds for quashing service purportedly made upon movants in any capacity other than the individual capacity of movants, the following grounds are assigned, separately and severally:

1. No service can be made upon movants which could give this Court jurisdiction over the State of Alabama or any department or units thereof.

56 2. No service can be made upon movants which could give this Court jurisdiction over the Board of Registrars of Macon County, Alabama.

3. For that it appears from the bill of complaint and the facts herein alleged that movants had no official connection with the said Board of Registrars of Macon County, Alabama at the time suit was filed or at the time of service.

4. For that it appears from the facts alleged herein that movants are not and have not been agents, servants or employees of the Board of Registrars of Macon County, Alabama, since a time prior to the institution of this suit.

5. For that it appears from the facts alleged herein that movants had no official capacity at the time of the purported service with reference to the Board of Registrars of Macon County, Alabama; that the service or purported service upon movants, as members of the Board of Registrars of Macon County, Alabama, is a nullity and without legal effect.

6. That any action of E. P. Livingston and Grady Rogers since December 10, 1959, was their action individually and not under color of office as a member of the Board of Registrars of Macon County, Alabama.

7. It is obvious that there are no reasonable grounds to believe that E. P. Livingston and Grady Rogers are about to engage in any act or practice as members of the Board of Registrars of Macon County, Alabama, which would deprive any other person of any right or privilege relating to voting rights, since they are no longer members of said Board of Registrars, and the Civil Rights Act of 1957 requires this as basic jurisdiction.

8. This Court has no jurisdiction over the State of Alabama or of the Board of Registrars of Macon County, Alabama, or E. P. Livingston, or Grady Rogers, as members of said Board, for lack of proper service.

57 9. This Court has no jurisdiction over the subject matter or of the parties.

Movants suggest to the Court the want of jurisdiction over the Board of Registrars of Macon County, Alabama for the additional reasons:

A. The Board of Registrars of Macon County is not a separate suable legal entity but a department or agency of the State of Alabama.

B. The Board of Registrars of Macon County, Alabama is not subject to suit.

C. The Board of Registrars of Macon County, Alabama is a governmental organization of the State of Alabama and is not subject to suit or independent from or distinguished from the State of Alabama.

D. To make the Board of Registrars of Macon County, Alabama a party is in fact and in legal effect to make the State of Alabama a party to this cause.

E. The Bord of Registrars of Macon County, Alabama cannot be served under Rule 4(6) of the Federal Rules of Civil Procedure.

F. The Board of Registrars of Macon County, Alabama is not such an entity as can be served with process or sued.

G. The Board of Registrars of Macon County, Alabama has no officers or agents upon whom service may be made within the subdivision of d(1) or d(3), or d(6) of Rule 4 of the Federal Rules of Civil Procedure.

H. If the Board of Registrars as such can be sued or can be made a party, a suit against said Board is a suit against the State of Alabama.

I. The State of Alabama has not been made a party in this cause or brought into court.

J. The State of Alabama is an indispensable party
58 and this cause lacks jurisdiction therefor.

K. This Court is without jurisdiction over the State of Alabama or the Board of Registrars of Macon County, Alabama for lack of, and in absence of, compliance with the requirements for service under Rule 4(d) 6 of the Federal Rules of Civil Procedure.

L. This action against the Board of Registrars of Macon County, Alabama is in effect a suit against the State of Alabama and your movants are not the proper persons or the authorized individuals upon which service of process may be made to obtain jurisdiction over the State of Alabama.

The movants further suggest to the Court the lack of jurisdiction for the following basic reason, even should proper service be made:

M. This is an action under the Civil Rights Acts of 1957, and by the terms of said Act, action must be against "*individuals*," who, under color of their respective state office, subject another person to denial of Federal Constitutional rights.

N. This Court is without jurisdiction under the Civil Rights Act of 1957 to enterain an action against the State of Alabama or the Board of Registrars of Macon County, Alabama.

O. The suit undertakes to control the State of Alabama and its officers and is forbidden by the 11th Amendment to the Constitution of the United States.

Respectfully Submitted

GRADY ROGERS and
E. P. LIVINGSTON

By:

E. P. ANDRESS
Attorney

MACDONALD GALLION
Attorney General State of Alabama

N. S. HARE
Sp. Ass't. Atty. Gen.

59 CERTIFICATE OF SERVICE

(Omitted in printing)

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60 **Exhibit A.1.—Affidavit of E. P. Livingston**

(Omitted. Printed side page ~~40~~ 33 supra)

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62 **Exhibit A.2.—Affidavit of Grady Rogers**

(Omitted. Printed side page ~~42~~ 35 supra)

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64 **Exhibit B—Subpoena**

(Omitted. Printed side page ~~44~~ 36 supra)

(File endorsement omitted)

65 IN UNITED STATES DISTRICT COURT

(Title omitted)

Motion of Grady Rogers and E. P. Livingston to Dismiss the Complaint—Filed February 20, 1959

Comes defendants, Grady Rogers and E. P. Livingston, personally and in their individual capacity only and in no other capacity, and admit jurisdiction of this Court over them as individuals, but as individuals only and appearing specially for the purpose of this motion and without admission of the jurisdiction or authority of this Court over them in a representative capacity or over the Board of Registrars of Macon County, Alabama, or over the State of Alabama, and move that the complaint heretofore filed in this cause by the plaintiff be dismissed and in support thereof assigns the following grounds separately and severally:

1. For that it affirmatively appears from the allegations of the bill of complaint that this Court is without jurisdiction to grant to the plaintiff the relief prayed for in said bill.

2. For that it affirmatively appears from the allegations of the bill of complaint that this Court is without jurisdiction to grant relief to the plaintiff against the Board of Registrars of Macon County, Alabama.

3. For that it affirmatively appears from the allegations of the bill of complaint that this Court is without jurisdiction to grant relief to the plaintiff against either Grady Rogers or E. P. Livingston in their capacity as members of the Board of Registrars of Macon County, Alabama.

66 4. For that it affirmatively appears from the allegations of the bill of complaint that this Court is without jurisdiction to grant relief to the plaintiff against the State of Alabama, and it appears that the party designated as "The Board of Registrars of Macon County, Alabama," is in law and in fact the State of Alabama.

5. For that it affirmatively appears that this Court is without requisite jurisdiction.

6. For that it affirmatively appears that the questions presented in the bill of complaint are moot.

7. For that it appears that the State of Alabama is an indispensable party to this action.

8. For that it affirmatively appears that this is an action under the Civil Rights Acts of 1957, and by the expressed terms of said Acts, such action must be against individual persons who, under color of their respective State office, subject some person, to denial of Federal Constitutional rights.

9. For that it affirmatively appears that the Civil Rights Acts of 1957 do not authorize action against the Board of Registrars of Macon County, Alabama, or the State of Alabama.

10. For that it affirmatively appears that this Court is without jurisdiction of an action against the Board of Registrars of Macon County, Alabama.

11. For that it affirmatively appears that this suit undertakes to control the State of Alabama and its officers, and is in effect an action against the State and forbidden by the Eleventh Amendment to the Federal Constitution.

12. For that it does not appear from the bill of complaint that there are reasonable grounds to believe that any person is about to engage in any act or practice which
67 would deprive any other person of any right or privilege relating to voting rights, and specifically no facts are alleged showing that defendants Grady Rogers and E. P. Livingston, either individually or under color of their former office as members of the Board of Registrars, are about to engage in such acts or practices.

13. It affirmatively appears from the bill of complaint that defendants, Grady Rogers and E. P. Livingston, vacated their office as members of the Board of Registrars of Macon County prior to the institution of this suit and, therefore, they cannot act under color of such office and cannot engage in any act or practice under the color of such office which would deprive any other person of any right of privilege relative to voting.

14. For that it affirmatively appears that the question or issues as to defendants, Grady Rogers and E. P. Livingston, are moot.

15. For that it appears that any order of this Court in response to any prayer of the bill of complaint would be premature, futile, ineffectual, and without effect.

16. For that it affirmatively appears that there is no party or persons before the Court against whom the requested relief can be granted.

68 Respectfully submitted,

GRADY ROGERS AND E. P. LIVINGSTON, *Defendants*

By—

L. P. ANDRESS
Attorney

MACDONALD GALLION
Attorney General
State of Alabama

N. S. HARE
Sp. Ass't. Atty. Gen.

CERTIFICATE OF SERVICE

(omitted in printing)

(File endorsement omitted)

69 IN UNITED STATES DISTRICT COURT

(Title omitted)

Notice of Intention to Take Oral Testimony—Filed February 20, 1959

Defendants give notice that they intend to give oral testimony at the Hearing on the Motion to Dissolve The

Temporary Restraining Order set Feb. 23, 1959, and on the other Motions before the court.

N. S. HARE
Sp. Asst. Atty. Gen.
State of Alabama

Service of above notice accepted Feb. 20, 1959.

HARTWELL DAVIS
U. S. Attorney

(File endorsement omitted)

70 IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

(Title omitted)

Amendment to Complaint—Filed February 23, 1959

Pursuant to the provisions of Rule 15 of the Federal Rules of Civil Procedure, plaintiff, the United States of America amends the complaint filed herein to add as an additional party defendant the State of Alabama and to include the following as paragraphs 3(a) and 17(a) thereto:

3(a). Defendant State of Alabama is a sovereign state of the United States which acts through agents, officials, and agencies, including the registrars of Macon County, Alabama, and those agents, officials, and agencies which have the power and are under the duty to appoint, remove, and control the registrars of Macon County, Alabama. Defendant State of Alabama has the duty under the Constitution and laws of the United States to permit all qualified citizens of the United States in the State of Alabama to vote without distinction of race or color, and to prevent acts or practices by any of its agents, officers, and agencies which deny or abridge the right to vote on account of race or color. Notwithstanding the legal duties aforesaid, Defendant State of Alabama has, for reasons of race or color, persisted in acts and practices which

deprive Negro citizens in Macon County, Alabama, of their rights to vote, and has, acting through the agents, officials, and agencies named in paragraph 10 through 15 of this complaint, engaged in the discriminatory and unlawful practices specified in said paragraphs. A judgment is sought in this action declaring such past acts and practices of Defendant State of Alabama to be illegal under the Constitution and laws of the United States, and enjoining Defendant State of Alabama from engaging in such illegal acts and practices in the future and from interfering with the performance of such acts and practices as may be required by the Constitution and laws of the
71 United States and the decree of this Court.

17(a). There are reasonable grounds to believe that Defendant State of Alabama, through its agents, officials, and agencies, will engage in the illegal acts and practices set forth in this complaint unless enjoined by this Court.

The prayer is amended by adding to section (b) thereof on page 8 of the original complaint immediately after the word "enjoining" the following words:

> . . . the Defendant State of Alabama, through its agents, officials, and agencies, . . .

W. WILSON WHITE JR
W. Wilson White
Assistant Attorney General

JOSEPH M. F. RYAN, JR.
Joseph M. F. Ryan, Jr.
Attorney,
Department of Justice

(File endorsement omitted)

72 IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

Civil Action No. 479-E

UNITED STATES OF AMERICA, *Plaintiff*

v.

STATE OF ALABAMA, ET AL, *Defendants*

Certificate of Service—Filed February 23, 1959

I hereby certify that I have on the 23rd day of February 1959, personally served copies of the following pleadings and memoranda on Nicholas Hare, Esquire, Special Assistant Attorney General of the State of Alabama, by handing him said copies in the Federal Court Building, Montgomery, Alabama:

(1) Amendment to complaint.

(2) Memorandum in Opposition to Motion to Dismiss.

(3) Memorandum of law in support of plaintiff's Motion to Produce.

(4) Memorandum in opposition to Motion to Quash.

JOSEPH M. F. RYAN, JR.
Joseph M. F. Ryan, Jr.
Attorney for Plaintiff

(File endorsement omitted)

73 IN UNITED STATES DISTRICT COURT

(Title omitted)

Amendment of Motion to Dismiss—Filed February 23, 1959

Comes Defendants Grady Rogers and E. P. Livingston in their individual capacity only, as set out more fully in the original motion, and, by leave of Court heretofore had and obtained, amend the motion to dismiss heretofore filed

in this cause on, to wit, February 20, 1959, by making a part of said motion the affidavits of Grady Rogers and E. P. Livingston, attached hereto as Exhibits "A" and "B", which said affidavits in the form of Exhibits "A" and "B" are incorporated into the motion to dissolve by reference.

MacDonald Gallion
MacDonald Gallion
Attorney General

N. S. Hare
N. S. Hare
Special Assistant
Attorney General

L. K. Andrews
L. K. Andrews
Attorneys for Defendants

Certificate of Service

(omitted in printing)

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74 **Exhibit A.1.—Affidavit of E. P. Livingston**

(Omitted. Printed side page ~~10~~ 33 supra)

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76 **Exhibit A.2.—Affidavit of Grady Rogers**

(Omitted. Printed side page ~~12~~ 35 supra)

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78 **Exhibit "B"—Subpoena**

(Omitted. Printed side page ~~14~~ 36 supra)

(File endorsement omitted)

79 IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

Civil Action No. 479-E

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF ALABAMA, et al, *Defendant*

Motion for Order Allowing Amendment—
Filed February 23, 1959

Comes now the Plaintiff, the United States of America, by its Attorneys and moves this Honorable Court for an order allowing plaintiff to amend the Motion to Produce and to permit the Inspection, Copying, and Photographing of Records under Rule 34 filed herein on February 12, 1959, by adding as a Defendant in the caption the words "and The State of Alabama" and by adding to Paragraph 2 of said motion after the word "defendants" the phrase "including the State of Alabama" and for reasons therefor states as follows:

This Court orally gave permission to plaintiff to amend the complaint herein during a hearing in open court on February 23, 1959. Said amendment added the State of Alabama as a defendant. For the purposes of preserving this Court's jurisdiction adequately to dispose of the motion to produce it is necessary that the additional defendant, the State of Alabama be added to the said motion.

Respectfully submitted

JOSEPH M. F. RYAN, JR.
Joseph M. F. Ryan, Jr.
Attorney for Plaintiff

(File endorsement omitted)

80 IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

(Title omitted)

Motion to Extend Temporary Restraining Order and to Include Defendant State of Alabama—Filed February 23, 1959

Come now the United States by its attorneys and moves this Honorable Court to extend the Temporary Restraining Order entered in this cause on February 12, 1959, pending disposition of Plaintiff's motion to produce filed herein pursuant to Rule 34 of the Federal Rules of Civil Procedure, Plaintiff further moves to amend said Temporary Restraining Order to include Defendant State of Alabama under the terms thereof.

Respectfully submitted

JOSEPH M. F. RYAN, JR.
Joseph M. F. Ryan, Jr.
Attorney, Department of Justice

(File endorsement omitted)

81 IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

(Title omitted)

Order Granting Plaintiff's Motion to Amend Its Motion to Produce, and Adding the State of Alabama as a Party Defendant—February 23, 1959

This matter having come on for hearing and the Court having instructed counsel for the plaintiff to file a motion to amend the Motion to Produce in accordance with Rule 34 heretofore filed in this cause on February 12, 1959, and such a motion to amend having been filed, and,

It appearing to the Court that an amendment to the complaint herein has been filed naming as an additional party defendant the State of Alabama, and,

It further appearing that said additional defendant may be a necessary party to any relief which this court might see fit to grant with respect to the disposition of the Motion to Produce,

It is therefore, ADJUDGED, ORDERED and DECREED that Plaintiff's Motion to Amend the Motion to Produce herein be and hereby is granted, and it is,

FURTHER ORDERED that the State of Alabama be and it is added as a defendant in the caption of said motion and is included within the terms Defendants in paragraph 2 of said Motion to Produce.

It is further ORDERED that the Clerk of this Court serve an attested copy of this order along with an attested copy of the Motion to Produce filed in this cause by Plaintiff on February 12, 1959, on the State of Alabama.

Done this 23rd day of February 1959.

FRANK M. JOHNSON, JR.,
Frank M. Johnson, Jr.
United States District Judge

(File endorsement omitted)

82 IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

(Title omitted)

Order Amending the Temporary Restraining Order to Include Defendant State of Alabama and Extending Said Order—February 23, 1959

This cause came on to be heard in open court and on Plaintiff's written motion to amend the Temporary Restraining Order filed herein on February 12, 1959, to include Defendant State of Alabama under the terms thereof, and to extend said order pending disposition of Plaintiff's motion to produce filed herein pursuant to Rule 34 of the Federal Rules of Civil Procedure and,

It appearing that the State of Alabama has been joined as a party defendant in this action, and good cause being shown in open court,

It is, therefore, ORDERED, ADJUDGED and DECREED that Plaintiff's motion be and is hereby granted and that said Temporary Restraining Order be and is hereby amended to include Defendant State of Alabama under the terms thereof and that such order as amended be and is hereby extended until and including March 5, 1959.

It is further ORDERED that the Clerk of this Court serve an attested copy of this order along with an attested copy of the Temporary Restraining Order filed in this cause on February 12, 1959, on the State of Alabama, and an attested copy of this order be served on each of other defendants named herein.

Done this 23rd day of February 1959.

FRANK M. JOHNSON, JR.,
Frank M. Johnson, Jr.
United States District Judge

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84 **Government's Exhibit No. 1**

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

Civil Case No. 479-E

UNITED STATES OF AMERICA

vs.

THE BOARD OF REGISTRARS OF MACON COUNTY, ALABAMA; GRADY ROGERS, E. P. LIVINGSTON, REGISTRARS

Deposition of TOM F. YOUNG, taken pursuant to an agreement of counsel (SEE STATEMENT OF MR. DAUGHTRY NEXT FOLLOWING APPEARANCES) on behalf of the plaintiff, before Glynn Henderson, Official Court Reporter for the United States District Court for the Middle District of Alabama, at Montgomery, Alabama, on February 22, 1959, beginning at 2:30 p.m.

APPEARANCES:

For the Plaintiff: Hartwell Davis, United States Attorney, and Ralph M. Daughtry, Asst. United States Attorney.

For the Defendants: (See Statement of Mr. Daughtry next.)

MR. DAUGHTRY: This statement is made for the record: I talked to Mr. Nicholas Hare, Special Assistant Attorney General for the State of Alabama, and of counsel in this case, on February 21, 1959, with reference to taking of the deposition of Mr. Tom F. Young, Circuit Solicitor
85 of Macon County, Alabama, on February 22, 1959, at two thirty, p.m., in the Post Office Building, Montgomery, Alabama. At that time, Mr. Hare advised me that counsel for the respondents would waive all notice and formalities in the taking of said deposition of Mr. Young. That is all.

TOM F. YOUNG, called as witness by the plaintiff, having been duly sworn, testified as follows:

Direct Examination:

By Mr. Davis:

Q. What is your name? A. Tom F. Young.

Q. What is your occupation? A. I am Circuit Solicitor of the Fifth Circuit of the State of Alabama, Fifth Judicial Circuit.

Q. What—does that Circuit include Macon County? A. Yes, sir.

Q. Alabama? A. Yes, sir; four others.

Q. Mr. Young, where do you live? A. I live in Alexander City, Alabama.

Q. Do you have your principal office there? A. Yes, sir.

Q. Mr. Young, how long have you been Circuit
86 Solicitor of the Fifth Judicial Circuit? A. I have been Circuit Solicitor for four years, and am commencing on my new term as Circuit Solicitor for the Fifth Circuit.

Q. Did that term commence on January 19? A. Yes, sir.

Q. Mr. Young, were you Circuit Solicitor of the Fifth Judicial Circuit on the 3rd day of December, 1958, and since that time? A. Yes, sir.

Q. On the 3rd day of December—strike that please. I will show you a paper marked Exhibit B and attached to—a copy of which is attached to motion to strike and

to quash answer to or objection to the motion to produce and another paper called motion to dissolve the temporary restraining order, each of these three papers has been filed in case pending in the United States District Court for the Middle District of Alabama entitled United States of America, plaintiff, against Board of Registrars of Macon County, Alabama, Grady Rogers, E. P. Livingston, Registrars, defendants, Number 479-E; I will ask you to look at that paper. That paper is marked Exhibit B to each of the three papers referred to. A. Yes, sir.

Q. Mr. Young, what is that paper? A. That paper is a copy of a subpoena which I issued on the 8th day of December of 1958.

Q. Was that witness—issued on the 8th or the 3rd, Mr. Young? A. 3rd—3rd, it is—

87 Q. Just a moment, please. All right. All right, sir, tell us, please, sir, just what the paper is? A. This is a subpoena duces tecum which I prepared or had prepared for the attachment—for the purpose of attaching the records of the Board of Registrars of Macon County, Alabama. In my recollection, it was served on about the 8th day of December of 1958, the date being on the 3rd of December, or the date of the instrument.

Q. Mr. Young, do you know who served this paper? A. It was served by the Sheriff of Macon County, Alabama.

Q. Did he take the records, books, and dossiers pertaining to and maintained by E. P. Livingston as a member of the Board of Registrars for Macon County, Alabama, into his custody? A. Yes, sir; at my direction.

Q. Yes, sir. Now, when did he take them into his custody? A. I believe it was on the 8th day of December, 1958.

Q. Was this paper made— A. I would like to say this; it was on the day of a hearing here in Montgomery. As I recall it, that date was the 8th.

Q. Did this paper that you issued that is marked—the copy of which is marked Exhibit B and which we will refer to from now on for the purpose of brevity as Exhibit B— A. (Nodded to indicate affirmative response)

Q. —what was the occasion of your issuing that

88 subpoena duces tecum? A. At this time I had read of and heard orally of a charge made by certain

parties from Macon County, or alleged to have been made by certain parties from Macon County, Alabama, claiming that they were discriminated against by the Board of Registrars of Chambers—of Macon County, Alabama, and I being a State Solicitor representing Macon County, Alabama, felt that if any such thing was going on that it was place for the State Court to—it was a matter for the State Court to look into. I attached these records with my personal intentions being to turn them over to the coming Grand Jury of Macon County, Alabama.

Q. Now, after the Sheriff took the records into his custody, did you see them? A. Yes, sir; I have had custody of the records.

Q. Do you have the custody of the records at this time? A. Yes, sir.

Q. Where are they located? A. They are located in the office for the Board of Registrars of Macon County at Tuskegee, Alabama.

Q. Do you—if they are there, do you have them in your direct custody and control? A. Yes, sir.

Q. I mean personally or— A. Not—no, sir; only as the Solicitor for the Fifth Judicial Circuit.

89 Q. Under this subpoena? A. Sir? As a—as a consequence—as a consequence of the—of this subpoena that I issued.

Q. Are these—you are not—you do not have them in your physical custody, do you? A. At this time, no, sir.

Q. And during most of the time since they have been attached they have not been in your physical custody, have they? A. No, sir.

Q. Whose physical custody have they been in during most of that time? A. They have been in no one's physical custody in the way I interpret physical custody; they have been in my custody in the court house at Macon County, in a office and in files to which I have the keys.

Q. In whose office are they kept? A. This is in the Board of Registrars office, which has been vacated by the members of the Board, and the keys and all the material of this office, files, are in my possession; I consider them in my possession.

Q. Do you—do you have anyone else who has a key to that office? A. The Sheriff of Macon County, Alabama,

under the law is custodian of the court house, and I believe that as custodian he has a key to every office.

Q. Have you got the other keys to that office?

90 A. Yes, sir.

Q. Does anyone else have any to the best of your knowledge? A. Not to my knowledge.

Q. Mr. Livingston? A. I understand there were—there was a set of keys that was misplaced some—during the lifetime of Mr. Zachary. Now, I may be incorrect in exactly who lost these keys, but it seems to me that Mr. Zachary, the deceased member of the Board—

Q. Was the keys of—did Mr. Livingston and Mr. Rogers, Mr. Grady Rogers, each have a set of those keys? A. All I know is on the day I received the keys, I had—incidentally at that time I had the records of this office in my custody stored in a vault, at my direction, and as I recall it, Mr. Livingston was the one that turned the keys over t[illegible] and there were two sets of these keys; I don't recall Mr. Rogers giving me any keys.

Mr. Davis: Off the record, wait just a minute.

Q. Mr. Young, how many rooms are reserved for the Registrars in Macon County, in the court house? A. At one time—I can't say, all I know is that at this time there is one room reserved for the Board of Registrars.

Q. Do you know how many rooms were reserved for the Board of Registrars when these records were attached by you under this subpoena duces tecum, or taken into your custody? A. All I know is that when I took

91 that possession of these keys I went to one room, I opened the door with one of the keys on the key ring and I saw no other room, and the files of this office were all contained in this one room.

Q. Is that the only room that you have seen the Board of Registrars use before that time? A. Yes, sir. And that is—however, as you know, I am not a resident of Macon County, Alabama; I am there only on occasion of court or some matter that pertains to my duties as Circuit Solicitor; I couldn't testify as to what the Board of Registrars uses or has used in the past.

Q. Has there been any other papers filed in this matter under which you brought this subpoena duces tecum? A. I only filed one paper, I mean one—at one instant I

filed—served two papers, one on Grady Rogers and one on Mr. Livingston; I say I served them, I had them served.

Q. Is this this Exhibit B that you are speaking of? A. Now, I don't know that this is the copy of—exact copy of that subpoena; as I recall it, I am certain my name was signed on the subpoena—subpoenaes. Now—.

Q. Do you see any difference between that and the one you served, or is that, to the best of your knowledge, identical—an identical copy as the State alleges it to be, or is—strike that statement, make it respondents allege it to be? A. Well, there is not such—

Q. Before you answer that. (Showed witness document) A. May I ask this question off the record?

92 Q. Yes.

(Off the record discussion held at this point)

A. The wording on Exhibit B, I believe that is the correct classification for this, appears to be exactly the same as the papers or the original subpoena which I issued on these two parties. The wording and the markings are—of the paper seem to be.

Q. In other words, it is exactly the same except it doesn't bear your signature? A. Signature, yes, sir.

Q. I see. A. I mean, as I recall it.

Q. Was there any complaints filed in this matter, in which you filed this subpoena duces tecum? A. No, sir; only in Federal Court. There was a matter, as you know, at that time pending in the Federal Court wherein complaints had been made against the Board of Registrars of Macon County, Alabama, and I—it was my intention at that time to have a Grand Jury, the next session of the Grand Jury of Macon County, Alabama, investigate any such claims or any such accusations made by parties who had complained to the Civil Rights Commission. I might say this, that I felt that had there been any bona fide claims that these parties would have come to me initially rather than going to the Civil Rights Commission.

93 Q. Mr. Young, to get the record straight, that matter, that was not pending in the Federal Court on the 3rd day of December, but was pending before the Civil Rights Commission in Montgomery. A. Yes, sir; I stand to be corrected.

Q. All right. Now, did you ever file any complaint in this matter in which you commanded E. P. Livingston here in Exhibit B as shown in Exhibit B to deliver these records to you—to you? A. No, sir.

Q. Not then or at any time since then? A. No, sir; however, the Grand Jury has not met.

Q. You are still holding them for the Grand Jury? A. Yes, sir.

Q. All right. A. Grand Jury will meet in something like a month from now.

Q. Now, have you filed any proceeding before either of the Judges of the Fifth Circuit to impound the records which you had delivered to you under this subpoena duces tecum, marked Exhibit B? A. I will say that I have merely discussed the matters with the Circuit Judges, the two Circuit Judges, incidentally we have three now.

Q. Yes. A. But at that time we had two. And
94 I did discuss the matter and these alleged claims of abuse on certain parties by the Board of Registrars, I have discussed that, and I still say that it appeared to me that if there was any such discrimination as claimed by these complainants in the Civil Rights Commission basing their proceedings on, it seems to me that I would have heard at least in one instance about them. I would like for the record to show that as Solicitor I have not in four years, I have not had the first claim made to me by any party, colored or white, in Macon County that they were being discriminated against and that they were not being allowed to register.

Q. Now, just to get the record clear, did you file any proceeding before any of the Judges of the Fifth Judicial Circuit to impound these records? A. No, sir.

Q. All right. A. I discussed the matters with the Circuit Judges.

Q. Yes, sir; just—that is enough. A. Under the law of the State of Alabama, I have the right of this process.

Q. Mr. Young, were you the—you have stated that you were the custodian of these records from the 8th of December to date, so you were the custodian of them on January 6 and 7th, 1959? A. Yes, sir.

Q. Mr. Young, were you present when Civil Rights
95 Agents, Colonel A. H. Rosenfeld— A. (Nodded to indicate affirmative response)

Q. —and others examined these records? A. At all times.

Q. And did they examine them in the court house in Macon County, Tuskegee, Alabama? A. Yes, sir; in the Grand Jury room.

Q. Did you relinquish the custody of the records at any time during that time? A. Yes, sir; upon the—as far as the custody; no, sir.

Q. You allowed them to look at them? A. I allowed them to look at them under the direction of Honorable Frank M. Johnson, Judge of the Federal Court in the Middle District.

Q. And did they photostat the records, some of the records, or copy them? A. At that time they had a—on the last day that they were there they had a photostat machine with them, and they took—rather, it appeared to me that they were taken, and they went through the process of taking photostats, whether or not these were any good I don't know.

Mr. Davis: Off the record one minute.

(Off the record discussion held at this point)

Q. At that time were E. P. Livingston and Grady Rogers present? A. Yes, sir; Mr. Livingston was present
96 most of the time; Mr. Rogers was present on the—I will say about approximately half of the time.

Q. What were they doing there? A. They were there at the same—for the same reason that I was there, at the request of—I took it to be the Court, Federal Court, and at the request, I believe, of Colonel Rosenfeld.

Q. And that was on January 6 and 7, 1959, Tuesday and Wednesday? A. As I recall the date; yes, sir.

Q. Now, did Mr. Rogers or Mr. Livingston take any control of these records at that time? A. No, sir.

Q. Since you are the custodian of the records at present, will you please tell us whether they are being used in any way at this time? A. No, sir; they are not, not that I know of, I don't see how they could be.

Q. When were they last used? A. Now, may I ask you what you mean by used?

Q. When were they last inspected by anyone? A. In my presence some three weeks ago, I went to Tuskegee and met there with Mr. Malone of the Attorney General's

office, and Mr. Ed Strickland, I met them at their request, and they were allowed to look at the applications of the complaining witnesses who had appeared before the Civil Rights Commission.

97 Q. From that time— A. And they—that is all that they looked at.

Q. From that time until this date, have they been inspected by anyone? A. Not to my knowledge.

Q. Well, you are the custodian? A. Yes, sir.

Q. Now, from January 7 until that time, were they inspected by anyone? A. From January 7—

Q. Until you went there with Mr. Malone and Mr. Strickland three weeks ago, were these records inspected by them? A. Yes, sir; on the 9th day of December.

Q. I said from January 7— A. Oh—now, I have been in that room, myself, and I have checked the files there; I understood they were—they were painting in the building at the time, and I went in and checked the files and now I believe that the—on or about the—I don't recall the date, I believe Mr. Malone went there to—for the purpose of photostating these records. Now, if that is what you mean, the records that he had looked at.

Q. After—after the time three weeks ago you are speaking of? A. I was in court in Alexander City at the time, and I will have to correct one thing; I have

98 not had the custody of these keys every minute of the time. I have had—there has been a matter of a few days that I have not had custody of these keys since then.

Q. Otherwise, has anyone seen these records, except Mr. Malone and Mr. Strickland since the 7th day of January? A. No, sir. Not to my knowledge; as I say, I don't know.

Q. Well, you—you are the custodian? A. Yes, sir.

Mr. Davis: All right, that is all.

TOM F. YOUNG
Deponent

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

I, Glynn Henderson, Official Court Reporter for the United States District Court for the Middle District of Alabama, hereby certify that the foregoing 15 pages constitute a true and correct transcript of the deposition of Tom F. Young, which deposition was taken before me as stated in the caption, the witness having been sworn prior to his testimony by me to tell the truth, the whole truth, and nothing but the truth; I further certify that the witness has, in my presence, read and duly signed his deposition.

This 22nd day of February, 1959.

GLYNN HENDERSON
Official Court Reporter,
Middle District of Alabama.

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99 **Order Amending the Temporary Restraining Order to Include Defendant State of Alabama and Extending Said Order—February 23, 1959**

(Omitted. Printed side page 55 *supra*)

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100 **Marshal's Returns on Service of Writ**

(Omitted in printing)

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104 **Order Granting Plaintiff's Motion to Amend Its Motion to Produce, and Adding the State of Alabama as a Defendant—February 23, 1959**

(Omitted. Printed side page 54 *supra*)

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105 **Marshal's Return on Service of Writ**

(Omitted in printing)

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106 **Plaintiff's Motion to Produce and to Permit the Inspection, Copying and Photographing of Records Under Rule 34, Federal Rules of Civil Procedure—Filed February 12, 1959**

(Omitted. Printed side page 16 *supra*)

109 **Exhibit A—Affidavit of Joseph M. F. Ryan, Jr.**

(Omitted. Printed side page 18 *supra*)

112 **Marshal's Return on Service of Writ**

(Omitted in printing)

113 **Order Amending the Temporary Restraining Order to Include Defendant State of Alabama and Extending Said Order—February 23, 1959**

(Omitted. Printed side page 55 *supra*)

114 **Temporary Restraining Order—February 12, 1959**

(Omitted. Printed side page 24 *supra*)

117 **Marshal's Returns on Service of Writ**

(Omitted in printing)

(File endorsement omitted)

118 Summons in a Civil Action

IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

Civil Action File No. 479-E

UNITED STATES OF AMERICA, *Plaintiff*

v.

STATE OF ALABAMA, ET AL., *Defendants*

Summons and Marshal's Return—Filed February 26, 1959

To the above named Defendant:

You are hereby summoned and required to serve upon Hon. W. Wilson White, Assistant Attorney General, plaintiff's attorney, whose address is 216 Post Office Building, Montgomery, Alabama, an answer to the complaint as amended which is herewith served upon you, within Twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judg-

ment by default will be taken against you for the relief demanded in the complaint.

R. C. DOBSON
Clerk of Court.

ANNIE SCHOOLAR
Deputy Clerk.

[Seal of Court]

Date: February 23, 1959

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

119 **Return on Service of Writ**

I hereby certify and return, that on the 23rd day of February, 1959, I received this summons and served it together with the complaint herein as follows: on February 24, 1959 at 11:45 AM, I served a copy thereof, with a copy of the complaint dated Feb. 5, 1959 and copy of amended Complaint dated Feb. 23, 1959 on John Patterson, Governor, State of Alabama by handing copies to him in his office at Capitol Building, Montgomery, Alabama.

CHARLES S. PRESCOTT
United States Marshal,

By JACK S. JOHNSON
Deputy United States Marshal.

Marshal's Fees

Travel	$ .20
Service	2.00
	2.20

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his Deputy.

(File endorsement omitted)

120 IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

Civil Action No. 479-E

UNITED STATES OF AMERICA, *Plaintiff*,

v.

THE BOARD OF REGISTRARS OF MACON COUNTY, ALABAMA; GRADY ROGERS, E. P. LIVINGSTON, REGISTRARS, AND THE STATE OF ALABAMA, *Defendants*.

Motion of the State of Alabama to Dismiss the Complaint—Filed March 4, 1959

Now comes the State of Alabama and moves the Court to dismiss the complaint filed in this cause on the following separate and several grounds, to wit:

1. The complaint fails to state a cause of action against defendant upon which relief can be granted.

2. The action should be dismissed on the ground that the Court lacks jurisdiction.

3. It affirmatively appears that the allegations do not state a cause of action or grounds upon which relief may be had against this defendant.

4. For that it affirmatively appears from the allegations of the bill of complaint that this Court is without jurisdiction to grant to the plaintiff the relief prayed for in said bill.

5. For that it affirmatively appears from the allegations of the bill of complaint that this Court is without jurisdiction to grant relief to the plaintiff against the State of Alabama.

121 6. For that it affirmatively appears that this Court is without requisite jurisdiction.

7. For that it affirmatively appears that the questions presented in the bill of complaint are moot.

8. For that it affirmatively appears that this is an action under the Civil Rights Acts of 1957, and by the expressed terms of said Acts, such action must be against individual "persons" who, under color of their respective State office, subject some person to denial of Federal Constitutional rights.

9. For that it affirmatively appears that the Civil Rights Act of 1957 do not authorize action against the Board of Registrars of Macon County, Alabama, or the State of Alabama.

10. For that it affirmatively appears that this suit undertakes to control the State of Alabama and its officers.

11. For that it does not appear from the bill of complaint that there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege relating to voting rights, and specifically no facts are alleged showing that defendants Grady Rogers and E. P. Livingston, either individually or under color of their former office as members of the Board of Registrars, are about to engage in such acts or practices.

12. For that it appears that any order of this Court in response to any prayer of the bill of complaint would be premature, futile, ineffectual, and without effect.

13. For that it affirmatively appears that there is no party or persons before the Court against whom the requested relief can be granted.

122 14 (a). It appears that the plaintiff is a mere volunteer.

(b) This is a civil action and it has not been shown that plaintiff is suffering any injury or has any direct interest.

15. It appears that the plaintiff is not the real party in interest.

16. It appears that this is a vicarious controversy, or is not properly before the Court, or is moot as to the parties before the Court.

17. It appears that the real parties in interest are certain citizens of the State of Alabama and that the plaintiff is only a nominal plaintiff bringing this suit for and on behalf of said citizens or is affording a conduit through which these particular citizens of Alabama are asserting certain rights or alleged violations of rights personal to themselves, and, therefore, this Court will not entertain the suit, it being a suit against a state by citizens of that state.

18. It appears from the wording of the Civil Rights Act of 1957 that states are not proper parties.

19. It appears from the wording of the Civil Rights Act of 1957 that states are not included as parties for the additional reason that paragraph (d) of Section 1971 of Title 42, U.S.C. confers exclusive jurisdiction on the district courts of the United States which would violate Section 2 of Article III of the Constitution of the United States if the states could be parties under said Act.

20. The judicial power of this Court is limited to actual controversies by adverse litigants.

21. It appears that under the pleadings in this cause this Court could not form a conclusive or final judgment and the matter is not in such form that the Court is capable of acting upon it.

123 22. Article III, Section 2, Clause 2, of the Constitution of the United States confers original jurisdiction on the Supreme Court in all cases to which a state may be a party.

23. The "party aggrieved" by alleged acts of practices mentioned in the Civil Rights Act of 1957 could not sue the State and it can not be presumed that Congress intended to create a cause of action in favor of the United States for the benefit of other persons so as to evade the prohibition of a citizen sueing his state.

24. The district courts will not entertain this suit by the United States of America against a state for reasons of comity.

25. The district courts will not entertain a suit by the United States against a state involving a political question.

26. A district court will not exercise general supervisory control or power over a state government.

27. This Court has no jurisdiction over the governmental functions of a state.

28. A district court will not entertain a suit by the United States of America against a state to interfere with or to control by supervision the executive or administrative branches of government.

29. Under the separation of powers provided in the Constitution of the United States, it is not a judicial function for the courts to perform the ordinary duties of an executive branch or administrative department of the government, particularly those of state governments.

30. It appears that the question or matters involved in this cause are speculative, abstract, contingent or hypothetical.

31. The judicial powers of this court do not include control over a state government, particularly where
124 the case is not clear or where reasonable doubt exists about the propriety of the court assuming jurisdiction or of an interference by the courts.

32. A district court will not entertain a suit by the United States against a state involving only governmental function as distinguished from a proprietary interest.

33. The Civil Rights Act of 1957 (71 Stat. 634, 42 U.S.C. Sec. 1971) under which this complaint is filed is unconstitutional and void in that it is in violation of the 10th or 11th or 15th Amendment to the Constitution of the United States.

34. Part IV of the Civil Rights Act of 1957 (P.L. 85-315, 71 Stat. 634, 42 U.S.C. Sec. 1971) is unconstitutional and void in that it is in violation of the 10th or 11th or 15th Amendment to the Constitution of the United States.

35. Part IV of the Civil Rights Act of 1957 (P.L. 85-315, 71 Stat. 634, 42 U.S.C. Sec. 1971) is unconstitutional and void in that it is not appropriate legislation under the 15th Amendment to the Constitution of the United States, said Part IV relating to "persons" and not state action

as provided in said Amendment and makes no reference whatsoever to denial or abridgment of voting rights because of race or color.

36. Part IV of the Civil Rights Act of 1957 (P.L. 85-315, 71 Stat. 634, 42 U.S.C. Sec. 1971) is unconstitutional or invalid in that it refers to the denial or abridgment of voting rights by "persons" as distinguished from such denial or abridgment by the United States or by any state as provided in the 15th Amendment to the Constitution of the United States.

37. Part IV of the Civil Rights Act of 1957 (P.L. 85-315, 71 Stat. 634, 42 U.S.C. Sec. 1971) is unconstitutional or invalid in that it in no place refers to or is limited
125 to the denial or abridgment of voting rights on account of race, color, or previous condition of servitude as provided in the 15th Amendment to the Constitution of the United States.

38. Part IV of the Civil Rights Act of 1957, under which this action is brought, does not provide for such an action against a state for the denial or abridgment of voting rights by a state on account of race, color, or previous condition of servitude, and is not appropriate legislation under the 15th Amendment to the Constitution of the United States.

39. This Court is without jurisdiction to hear and determine this action for the reasons stated in 33, 34, 35, 36, 37 and 38 above, or some one or more of the grounds set forth therein which are hereby assigned by reference.

40. This Court is without jurisdiction to hear and determine this cause in that Part IV of the Civil Rights Act of 1957 (P.L. 85-315, 71 Stat. 634, 42 U.S.C. Sec. 1971) is not appropriate legislation under the 15th Amendment to the Constitution of the United States is that it does not refer or relate to the denial of voting rights by a state on account of race, color or previous condition of servitude.

41. The Civil Rights Act of 1957 (P.L. 85-315, 71 Stat. 634, 42 U.S.C. Sec. 1971) attempts to confer exclusive jurisdiction to district courts which contravenes Article III, Sec. 2, Clause 2, of the Constitution of the United States which gives the Supreme Court of the United States

original jurisdiction in all cases in which a state shall be a party.

42. It affirmatively appears that if there be any discrimination in voting rights, such action can not be attributed to the State of Alabama in view of the statutory and constitutional direction to the individual officers
126 conducting registration, said constitutional and statutory provisions being attached to and made a part of the plaintiff's complaint.

43. It appears from the complaint that the injunction sought by plaintiff against the State of Alabama goes beyond the discretionary or equitable power of this Court.

44. Unless the Civil Rights Act itself grants equitable jurisdiction to this Court to proceed against a state, and it does not, the common law or traditional limits of proceedings in equity do not extend to the equitable relief sought here against a state, including relief against alleged political wrongs.

45. Injunctive relief ordinarily will not be granted where it is not clear that the Court can enforce the kind of injunction prayed for.

46. It does not affirmatively appear therefrom that the United States of America had any legal right to commence it, or that the United States of America has any legal right to prosecute it.

47. It does not affirmatively appear therefrom that the defendants have engaged, or there are reasonable grounds to believe that the defendants are about to engage in any act or practice which would deprive any person of any right or privilege secured by subsections (a) and (b) of Title 42, Section 1971 of the United States Code.

48 (a) In the absence of the Civil Rights Act of 1957, and those portions of it, codified as Title 42, Section 1971 (c) and (d), United States Code, the United States of America could not possibly have had any right to commence and prosecute this action;

(b) No provision of the Civil Rights Act of 1957 authorized the United States of America to commence and prosecute this action, for the rule, unchanged by

127 the Civil Rights Act of 1957, is that whether a person, resident of and a citizen of Alabama, is entitled to be registered for the purpose of voting is determined solely by weighing his or her qualifications and disqualifications by standards outlined in the Constitution and Statutes of Alabama, and the question of alleged unconstitutional discrimination in registration cannot be determined by classes or groups of individuals as this action attempts to do, but must be determined as to each individual.

49. The Court lacks jurisdiction for that even under the Civil Rights Act of 1957, a suit may not be instituted in the name of the United States for preventive relief to a group or class of persons.

50. The allegations of the complaint and the applicable law, even if the applicable law plead is constitutional, do not warrant the relief sought.

51. The action does not seek preventive relief, but seeks with respect to the only parties named therein to have the Court review and reverse past decisions of the Board of Registrars of Macon County, Alabama, as to the eligibility of the alleged citizens of the United States to register under Alabama registration statutes. Therefore the action is not within the purview of Part IV of the Civil Rights Act of 1957 (42 United States Code, 1971 (e)).

52. Those provisions of Part IV of the Civil Rights Act of 1957, now codified as Sections 1971 (c) and (d) of Title 42 of United States Code, are unconstitutional and void, and exceed the legislative powers delegated by the States to the Congress of the United States, in that the aforesaid provisions purport to authorize the institution of an action by the United States of America in the District Courts of the United States, which action is not within the scope of the judicial powers delegated by the States to the United States by the Constitution of the United States, which provides that the judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the laws of the United States and Treaties made, or which shall be made under their Authority

128 The proceeding sought to be authorized by the statute aforesaid is not such a case in Law and Equity as was and is contemplated or authorized by the Constitution of the United States.

53. The action is not one cognizable by the Courts of the United States under the judicial power delegated by the States to the United States. The action is not a case, in Law or Equity, arising under the Constitution or Laws of the United States, or any treaty made under their authority.

54. Even if Part IV of the Civil Rights Act of 1957 should be held constitutional, even if the actions should be held to be a case, in Law and Equity, arising under the statute, even if the relief sought in the action is held to be within the purview of such action as is authorized by the statute, even if equitable power has been constitutionally delegated to the Court, the Court has the discretionary power to refuse to exercise that equitable power and so interfere with functions which are historically reserved to the States under Article II in Amendment 10 of the Constitution, and this Honorable Court should therefore refuse to entertain the action and grant relief sought.

55 (a). That portion of the Civil Rights Act of 1957 which is now codified as Title 42, Section 1971 (a), is unconstitutional and void, and beyond the powers of Congress to enact, in that it is too comprehensive as an exercise of relative power under the 15th Amendment to the Constitution of the United States, and no other provision of or Amendment to the Constitution of the United States would authorize Congress to enact that portion of the Civil Rights Act of 1957;

(b). It is not alleged that any of the defendants are intimidating, threatening, coercing, or attempting to intimidate, threaten or coerce any other person for the purpose of interfering with the right of such other person to vote, or to vote as he may choose, or of causing
129 such other person to vote for or not to vote for any candidate for the office of President, Vice President, Presidential elector member of the Senate or member of the House of Representatives, delegates or commissioners from the Territories or Possessions, at any general, special

or primary election held solely, or in part, for the purpose of selecting or electing any such condidate. Therefore, the Attorney General had not the power under Section 1971 (c) of Title 42 of the United States Code to institute for or in the name of the United States this action or proceeding.

56. The allegations in Paragraph 15 of the complaint, and the relief based thereon sought in Paragraph 17 of the complaint, and especially in sub-paragraph (b) of said Paragraph 17, the action is one against the State of Alabama, forbidden by the 11th Amendment to the Constitution of the United States which provides that the judicial powers of the United States shall not be construed to extend to any suit in Law or Equity, commenced or prosecuted against any one of the United States.

57. Part IV of the Civil Rights Act of 1957 is unconstitutional and void as being contrary to the 10th Amendment to the Constitution of the United States for that in it the Congress of the United States seeks to exercise functions which were reserved to the States under the aforesaid 10th Amendment.

58. This Court has no original jurisdiction in a mandamus proceeding against the State of Alabama and the requested injunction is in effect a mandatory injunction or a writ of mandamus.

130 Respectfully submitted,

STATE OF ALABAMA

By:

MACDONALD GALLION
MacDonald Gallion
Attorney General, State of Alabama

N. S. HARE
Nicholas S. Hare
Special Assistant Attorney General

CERTIFICATE OF SERVICE

(Omitted in printing)

(File endorsement omitted)

13] IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

(Title omitted)

Motion to Extend Temporary Restraining Order Herein as to the State of Alabama, Its Officers, Agents and Employees—Filed March 5, 1959

Comes the United States by its attorneys and moves this Honorable Court to extend the temporary restraining order entered herein on February 23, 1959, insofar as the same pertains to the defendant State of Alabama, its officers, agents and employees, and for reasons therefor states as follows:

1. The Court herein has under consideration several motions pending the disposition of which, upon request of counsel for the plaintiff, this Court issued a temporary restraining order against the State of Alabama in order to preserve the status quo.

2. Said restraining order, by its own terms, was effective to and including March 5, 1959.

3. It appears that the disposition of the motions which the Court has under consideration will not occur before the expiration of said temporary restraining order.

4. In order to preserve any right of the plaintiff herein, it is necessary that a second restraining order of 10 days be entered against the defendant State of Alabama, its officers, agents and employees.

Respectfully submitted

JOSEPH M. F. RYAN, JR.,
Joseph M. F. Ryan, Jr.,
Attorney, Department of Justice

(File endorsement omitted)

132 IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

(Title omitted)

Order Extending the Temporary Restraining Order—March 5, 1959

A motion having been made by the attorneys for the plaintiff, the United States, herein to extend the temporary restraining order entered herein against the State of Alabama on February 23, 1959, and it appearing that pending disposition of matters presently before the Court, in order to preserve the status quo, that such restraining order should be extended until this Court has adjudicated the matters before it or for a period not to exceed 10 days in any event,

It Is, therefore, Ordered, Adjudged and Decreed that such restraining order be, and the same is hereby, extended to and including March 16, 1959, or until this matter is adjudicated, whichever occurs first.

It is further Ordered that the United States Marshal serve an attested copy of this order on the State of Alabama by serving such copy on the Attorney General of the State of Alabama.

Done this 5th day of March 1959.

Frank M. Johnson, Jr.,
Frank M. Johnson, Jr.,
United States District Judge

(File endorsement omitted)

133 IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

Civil Action No. 479-E

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

STATE OF ALABAMA; THE BOARD OF REGISTRARS OF MACON COUNTY, ALABAMA; GRADY ROGERS, E. P. LIVINGSTON, REGISTRARS, *Defendants*.

Memorandum Opinion—March 6, 1959

This is an action by the United States, as plaintiff, against Grady Rogers and E. P. Livingston—each as a member of the Board of Registrars of Macon County, Alabama—The Board of Registrars of Macon County, Alabama, and the State of Alabama, as defendants.

The action is brought under Part IV of the Civil Rights Act of 1957 (P.L. 85-315, 42 U.S.C.A. 1971(c))[1] to obtain preventive relief against acts and practices by the named defendants which deprive other persons of rights and privileges secured by § 1971(a) of Title 42, U.S.C.A., namely, the right and privilege of citizens of the United States, who are otherwise qualified by law to vote at any election by the people in the State of Alabama, to be entitled and allowed to vote at all such elections without distinction of race or color.

The plaintiff says that each of the named defendants, being under a constitutional obligation to fulfill certain duties and obligations relative to registering qualified applicants of Macon County, Alabama, to vote without

[1] § 1971(c). "Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person."

regard to considerations of race or color, has, for many years, persisted in acts and practices in violation of this constitutional obligation, which acts and practices have resulted in depriving qualified citizens of their right to vote solely because of their race and color.

Originally the action did not include the State of
134 Alabama as a defendant. However, the action was, pursuant to the provisions of Rule 15 of the Federal Rules of Civil Procedure, amended on February 23, 1959, to add as an additional party defendant the State of Alabama.

Plaintiff details the "acts and practices" the defendants are alleged to engage in violation of their constitutional obligations and seeks to have this Court adjudge those acts and practices to be in violation of the constitution and laws of the United States and to declare that said defendants are under a legal duty not to engage in, or permit its agents, officials and agencies to engage in such practices. Plaintiff also seeks to have this Court permently enjoin the named defendants, or any of the defendants' agents, officials, and/or agencies from engaging in said acts and practices.

On February 12, 1959, the plaintiff, by appropriate motion and supporting documents, moved this Court for an order directing the defendants to produce and permit the inspection, copying, and photographing of certain records, documents, and papers. This Court, upon proper application, issued on February 12, 1959, a temporary restraining order pending disposition of said motion to produce, restraining the defendants and/or their agents from destroying or otherwise rendering unavailable certain voting and registration records and other enumerated documents made and received by the Macon County, Alabama, Board of Registrars since January 1, 1954. The motion to produce, the order that was entered upon the motion to produce, and the temporary restraining order were amended on February 23, 1959, to include defendant State of Alabama.

The defendants Rogers, Livingston, and The Board of Registrars of Macon County, Alabama, separately and severally (1) move to dismiss the action as to each of

them (amended February 23, 1959); (2) move to "strike and quash" the service upon each of them of the various papers in this cause; (3) object to plaintiff's motion to produce; and (4) move to dissolve as to each of them the temporary restraining order issued by this Court on February 12, 1959. The defendant State of Alabama also moves to dismiss the action as to it.

All of said defendants' motions and objections are now submitted to the Court upon the pleadings, certain affidavits and documents attached thereto, evidence by deposition, written briefs of all parties, and oral arguments of counsel.

Considering first the defendants Rogers, Livingston, and The Board of Registrars' amended motion to dismiss, with the supporting affidavits of the defendants Rogers and Livingston, it appears that said motion cites some
135 sixteen grounds in support thereof. The grounds fall into four general categories.[1] They are: (1) The State of Alabama is an indispensable party; (2) the action is precluded by the Eleventh Amendment to the Constitution of the United States; (3) no relief can be had against defendants Rogers and Livingston because they had resigned; and (4) the Civil Rights Act of 1957 authorizes suits only against individual persons.

Because of the conclusions hereinafter reached by this Court, it will not be necessary in connection with the motions of Rogers, Livingston, and The Board of Registrars, to discuss or decide the questions involved in the first two catagories.

Proceeding then to the third category of points (i.e., no preventive relief should be granted against Livingston and Rogers because they had resigned as registrars), the evidence presented—in the form of uncontroverted affidavits—shows that the members of the Board of Registrars of Macon County, Alabama, prior to December 10, 1958, were Grady Rogers and E. P. Livingston, the third member having died.[2] On December 10, 1958,[3] Livingston and

[2] In Alabama, registration of voters in each county is conducted by "a board of three reputable and suitable persons . . ." Title 17, § 21, 1940 Code of Alabama, as amended.

[3] Approximately two months before this case was filed.

Rogers each tendered to the appointing authority[4] a written resignation as a member of the Board of Registrars of Macon County, Alabama. Said resignations were submitted during a controversy between the Commission on Civil Rights and certain Alabama officials, including Livingston and Rogers, over the right of said Commission to inspect and copy some of the same records the plaintiff in this case now seeks.[5] Both Rogers and Livingston now say that said resignations were absolute and unconditional; that they were made in good faith, and that neither intends to serve again as a member of the Board of Registrars; that said resignations have been accepted by the appointing board, and that each of them has qualified and begun serving in two other public offices.[6] Both Livingston and Rogers testify that all of the records now sought by plaintiff were turned over to the sheriff of Macon County,
136 Alabama, by them on December 8, 1958; that such action by them was in response to a *subpoena duces tecum* issued at the instance of Tom F. Young; Circuit Solicitor of the Fifth Judicial Circuit of Alabama. Solicitor Young testifies by deposition in this cause and the effect of his testimony is to substantiate that part of Livingston's and Rogers' testimony. Solicitor Young unequivocally states that he now has the custody of said records and that said records are in a locked room in the courthouse of Macon County, Alabama.

[4] Appointing authority in Alabama is vested in the governor, auditor and commissioner of agriculture and industries, or by a majority of them acting as a board of appointment. See Title 17, § 21, 1940 Code of Alabama, as amended.

[5] In Civil Action No. 1487-N, styled In re: George C. Wallace, et al., this court on January 5, 1959, ordered these same two defendants to make said records available; said order was complied with, and both Livingston and Rogers were dismissed from said action.

[6] Rogers was in May, 1958, nominated for and in November, 1958, elected to the Alabama House of Representatives; he was sworn in and commenced serving as such official in January, 1959. Livingston was appointed to be a jury commissioner for Macon County sometime after this suit was filed.

THE DEFENDANTS LIVINGSTON AND ROGERS:

The matter is therefore focused as to Livingston and Rogers. If, as they contend, their resignations were effective in all respects, they cannot now be sued in their capacity as registrars of Macon County, Alabama.[7]

If, however, as the plaintiff contends, they have the continuing obligations of their office as registrars of Macon County, Alabama, until their successors are appointed,[8] they are proper parties to this action.

The statute prescribing the terms of office for the registrars in Alabama, designated as § 22 of Title 17, 1940 Code of Alabama, as amended, is as follows:

> "§ 22. *Terms of office.*—The registrars so appointed under this article may be removed at the will of the oppointing board, or a majority of the members thereof, at any time, with or without cause, and without giving their reasons therefor; and if not so removed, the registrars may hold office for four years from the time of their appointment and until their successors are appointed."

The plaintiff reasons that the word "may" as used in this statute is to be construed to mean "shall" wherever the rights of the pubic or third persons depend upon the exercise of the power or performance of the duty to which it refers. Such a theory is not without supporting authority even in Alabama. See *Montgomery* v. *Henry*, 144 Ala. 629 (1905).[9]

However, the real question here is: What did the Legislature of Alabama intend? There are no cases directly in point. In making an effort to resolve this question it is significant to note that Alabama has a general statute relating to terms of office. This general statute, designated as Title 41, § 176, 1940 Code of Alabama, as amended, reads as follows:

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[7] This Court does not understand that Livingston and Rogers are sued in any capacity other than as members of the Board of Registrars; their appearance in this cause as "individuals" was unnecessary.

[8] No successors have yet been appointed.

[9] Also see *Wilson* v. *United States*, 135 F. 2d 1005; *Vason* v. *City of Augusta*, 28 Ga. 542, and *People* v. *Turnbull*, 184 Ill. App. 151.

"*Vacancies in state and county offices; how filled; term of office.* Vacancies in all state and county offices are filled by appointment of the governor, except as otherwise provided; the appointees must be commissioned, and they shall hold their offices for the unexpired term, and until their successors are elected and qualified."

It can very readily be seen that § 176 of Title 41 is not applicable to the registrars because of that portion of § 176 that says "except as otherwise provided"; this is true since it is "otherwise provided" in § 22 of Title 17, supra. Thus, insofar as the term of office for registrars is concerned, § 22 of Title 17 is generally controlling.

This Court is of the opinion that had the Legislature of the State of Alabama intended for the registrars to remain obligated to serve until their successors were appointed and qualified they would not have used the permissive term "may" but would have used the imperative term "shall" as they did in the general statute, supra.

In *Badger, et al.* v. *U.S. Ex Rel. Bolles*, (1876), 93 U.S. 599, which case is heavily relied upon by the plaintiff, the Supreme Court had before it for interpretation a statute of the State of Illinois, the pertinent part of that statute being "they shall hold their offices until their successors shall be qualified." The question there before the court was whether or not certain officers, to-wit, a supervisor, town clerk, or justice of the peace, could resign their offices and thereby be relieved of their duties and responsibilities prior to the time their successor was appointed or chosen and was qualified. Mr. Justice Hunt, delivering the opinion of the Supreme Court of the United States in October, 1876, decided this question by stating:

"The resignations may be made to and accepted by the officers named; but, to become perfect, they depend upon and must be followed by an additional fact; to-wit, the appointment of a successor, and his qualification."

The court went on to say:

"So, we think, where a person being in an office seeks to prevent the performance of its duties to a

> creditor of the town, by a hasty resignation, he must see that he resigns not only *de facto*, but *dejure;* that he resigns his office not only, but that a successor is appointed. An attempt to create a vacancy at a time when such action is fatal to the creditor will not be helped out by the aid of the courts."

Another case relied upon by the United States to sustain its position that Livingston and Rogers cannot resign until their successors have been appointed and qualified is the case of *United States* v. *Green, et al.*, (Cir. Ct. W. D. Missouri, 1892), 53 F. 769. The applicable law there was part of the Constitution of Missouri, reading as follows:

> "In the absence of any contrary provision, all officers hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."[10]

A similar point was also raised in *United States* v. *Justices of Lauderdale County*, (1882), 10 F. 460; this case involved a Tennessee statute which stated that "every officer shall hold his office until his successor is elected or appointed and qualified."

The rationale of the *Badger*, *Green*, and *Lauderdale* cases is that the acceptance by an individual of a public office and the awarding of this office upon an individual is "the imposition of a public trust by agreement between the state and the officeholder. Why may not the state attach as a condition to the bestowal of the honors and compensation growing out of the trust, that it shall not be surrendered until the state has designated a successor, so that the public interests shall not suffer?" That rationale appears to be good, consistent, and legally sound insofar as it relates to the Illinois, the Missouri, and the Tennessee statutes. However, it is not sound and it cannot be made

[10] It should also be noted that in the *Green* case the process sought to be enforced (mandamus) was made final before the officials attempted to resign. The court seemed to attach considerable significance to that fact, saying: "Their attempt to thus escape the judgment of this court was as abortive as it was ill advised."

applicable to the Alabama statute. To hold that Registrars Livingston and Rogers entered into an agreement with the State of Alabama, when they accepted the appointment of registrars of Macon County, to the effect that they "shall" or "must" or "would" continue in said office until their successors had been appointed and qualified would be to disregard completely the wording of the Alabama statute.

To so hold would be to disregard completely the intent of the Legislature of the State of Alabama, which intent is manifested by the wording of that statute.

To so hold would be to disregard completely § 160, Title 41 of the 1940 Code of Alabama, as amended,[11] 139 , which statute specifically recognizes and provides that such offices can be vacated "By . . . resignation, except in such cases as are excepted by law." There are no exceptions in the case of registrars. In this connection, see *Amy* v. *Watertown* (1888), 130 U.S. 301, 316, in which case the Supreme Court recognized that the statute law of Wisconsin providing for the procedure to be followed in cases of resignation "was decisive" and "preclude the operation of any such rule as was recognized in Badger v. Bolles . . ."

Under the Alabama law, Registrars Livingston and Rogers (as well as any other registrars that accept an appointment while § 22 of Title 17 is in effect) accepted their appointments and agreed to serve "at the will of the appointing board" and with the understanding that they could be removed at any time by a majority of the appointing board (the governor, auditor and commissioner of agriculture and industries) "with or without cause and without giving their reasons therefor." For this Court

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[11] "§ 160. *How offices are vacated.*—Any office in this state is vacated:

"By the death of the incumbent.

"By his resignation, except in such cases as are excepted by law.

"By ceasing to be a resident of the state, or of the division, district, circuit, or county, for which he was elected or appointed.

"By the decision of a competent tribunal declaring his election or appointment void, or his office vacant.

"By the act of the legislature abridging his term of office, when the same is not fixed by the constitution.

"In such other cases as are or may be declared by law."

to follow the *Badger*, the *Green*, and the *Lauderdale* cases and to apply the rationale of those cases to this case would also mean that the registrar who accepted a position under a statute which said he "may hold office for four years" (subject to removal at the possible whim of the appointing board) could not for reasons of health or business, or other good and substantial reasons, in good faith terminate his office by resignation until the appointing authority decided to appoint his successor and until his successor got around to qualifying. This Court must and does now hold that the Legislature of the State of Alabama, in using the word "may" intended that the registrars not be required to hold office for four years from the time of their appointment, but that they "may" be removed with or without cause by the appointing board and that they "may" in good faith resign their office. Such an interpretation works no great hardship upon anyone. It does not permit any widespread conspiracy to defeat the law, it does not necessarily permit the paralyzation of governmental functions that are necessary to organized society, and it does not permit any "hiatus or interregnum," since the remedy of mandamus, if the circumstances warrant and justify its use, is always available to require the appointing board to fill, if they refuse to act within a reasonable time, any vacancies that may be created, such as these.

Nothing stated in this opinion should be construed to mean that this Court sanctions or will sanction the proposition (here unnecessarily advanced by Livingston and Rogers) that registrars are free to resign at will, indiscriminately and in bad faith, and thereby cast off all of their responsibilities and obligations as such officers.

THE DEFENDANT "THE BOARD OF REGISTRARS OF MACON COUNTY, ALABAMA":

The next category of points raised by the motion to dismiss relates only to the defendant "The Board of Registrars of Macon County, Alabama." It is contended that this Court has no jurisdiction over the Board of Registrars as such, because, first, said Board is not in fact or in law a separate suable legal entity, and, second,

the Board is not a "person" within the meaning of that section of the Civil Rights Act authorizing preventive relief suits such as this one.[12]

Registration in Alabama is provided for in § 186 of the Alabama Constitution of 1901 and Title 17, § 21 of the 1940 Code of Alabama, as amended.[13] It is the individuals on the Board, and not the Board itself, that conduct the registration; it is the individuals on the Board who may by their "acts and practices" deprive other persons of rights and privileges secured by the Constitution of the United States; it is the individual members of the Board who are under a constitutional obligation relative to registering qualified applicants of Macon County, Alabama, to vote. Therefore, it is the *individual* officers that preventive relief—herein the form of injunctions—must be obtained against."

In *Handy Cafe, Inc.* v. *Justices of the Superior Court, et al.*, (1st Cir., 1957), 248 F. 2d 485, cert. den. March 10, 1958, 356 U.S. 902, the plaintiff sued, under § 1983, Title 42, U.S.C.A.[14] (an old Civil Rights statute), "the members of the Superior Court and Supreme Judicial Court of the Commonwealth of Massachusetts." Plaintiff there claimed deprivation of certain constitutional rights by those defendants, under color of their respective offices and that it (the plaintiff) had been denied the equal protection of the laws, contrary to the Fourteenth Amendment. The plaintiff there sought declaratory relief and an injunction.

With reference to whether or not "the members of the Superior Court and Supreme Judicial Court" constituted a suable legal entity, the First Circuit Court of Appeals in a *per curiam* opinion[15] stated:

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[12] Sec. 1971(c), Title 42, U.S.C.A.

[13] The pertinent part of that Code section being set out in footnote 2.

[14] "Every person who, under color of any statute, ordinance, regulation or custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable . . ."

[15] Magruder, Chief Judge, and Woodbury and Hartigan, Circuit Judges, sitting.

141 "In addition to the foregoing, we are bound to observe that we know of no authority to the effect that 'the members of the Superior Court and Supreme Judicial Court of the Commonwealth of Massachusetts' constitute suable legal entities. Action under the Civil Rights Act must be against the individual persons or officials who, under color of their respective state offices, subject a person to denial of federal constitutional rights. There are over thirty judges of the Massachusetts Superior Court throughout the Commonwealth and seven justices of the Supreme Judicial Court. Obviously not all of these persons could have been concerned with the various state court proceedings herein complained of. It does not appear against which individuals judgments for damages and enforcement orders are sought to be issued.

"All in all, we regard this as a completely preposterous case."

Also in point here is the case of *Hewitt* v. *City of Jacksonville*, (1951, 5th Cir.), 188 F. 2d 423, where the court, speaking through Judge Holmes, said:

"The lower court, in refusing to allow the amended complaint to be filed, held that the word 'persons' used in the Civil Rights statute, 8 U.S.C.A. § 43, *does not include a State* or its governmental subdivisions acting in their sovereign . . . capacity." (Emphasis added.)

"We are in accord with the views expressed by the lower court;"

See also the Fifth Circuit case of *Charlton* v. *City of Hialeah*, (1951), 188 F. 2d 421, which followed the *Hewitt* v. *Jacksonville* decision.

Even though these cases involved another Civil Rights statute, this Court is of the opinion that the reasoning and conclusions reached are sound and should be applied in this case to plaintiff's action against "The Board of Registrars of Macon County, Alabama."

THE DEFENDANT STATE OF ALABAMA:

The motion to dismiss filed by the State of Alabama contains some fifty-eight grounds. These grounds fall into five general categories. They are:

(1) Civil Rights Act of 1957 authorizes actions only against "individual persons" and not states.

(2) States have exclusive jurisdiction in the field of voting by reason of the Tenth and Eleventh Amendments to the Constitution of the United States.

(3) Supreme Court of the United States has original and exclusive jurisdiction in cases involving sovereign states.

(4) Civil Rights Act of 1957 (particularly Part IV) is unconstitutional.

(5) Even if this Court determines that it has jurisdiction and determines that the Act is constitutional, it should refrain from exercising jurisdiction in this case because of comity.

Category two is obviously without merit. Part of
142 what this Court said in the case of *In re: George C. Wallace, et al.*, —— F. Supp. —— decided January 9, 1959), is applicable in this case and is dispositive of these points:

> "The authority delegated to the Federal Government by the Fifteenth Amendment to the Constitution of the United States is undoubtedly the authority under which the Congress of the United States was acting when the Civil Rights Act of 1957 was passed. The provision in the Act providing for investigation of alleged discriminatory practices, including inspection of voting and other pertinent records, must be considered to be an essential step in the process of enforcing and protecting the right to vote regardless of color, race, religion, or national origin. That part of the Act is, therefore, by this Court considered 'appropriate legislation' within the meaning of Section 2 of the Fifteenth Amendment.
>
> "The sovereignty of the State of Alabama, or of any other of the states, must yield, therefore, to this

expression of the Congress of the United States, since this expression of Congress—by this Act—was passed in a proper exercise of a power specifically delegated to the Federal Government, and the Court cites *Ex Parte Siebold*, 100 U.S. 371. This is necessarily true even though the states possess concurrent legislative jurisdiction with respect to voting, since the Federal Government, and its law, is supreme in this area. The Court cites *Kohl* v. *United States*, 91 U.S. 367.

"The concept of the sovereignty of the states is embodied in the Tenth Amendment to the Constitution of the United States, this amendment providing that those powers are reserved to the states which have not been 'delegated to the United States by the Constitution, nor prohibited by it to the States.'

"Here we have involved the very powers which the Constitution of the United States says are not reserved to the states. See *United States* v. *Reese*, 92 U.S. 214; *United States* v. *Darby*, 312 U.S. 100; and *Fernandez* v. *Wiener*, 326 U.S. 340.

"The fact that the State of Alabama voting and registration records are involved in this case does not alter and legal principle at all. *In re*: *Cohen*, 62 F. 2d 249; *United States* v. *Ponder*, 238 F. 2d 825; *Endicott Johnson Corporation* v. *Perkins*, 317 U.S. 501.

"Thus, it must be generally concluded, and this Court now concludes, that since the Congress of the United States did have the authority to pass the Civil Rights Act of 1957 and that said authority is supreme in this field as opposed to any authority of the states, and since the Commission on Civil Rights was in issuing the subpoenas in question acting pursuant to that Act, and since this Court was in issuing its order upon the application of the Attorney General of the United States also acting pursuant to said Act, the contention that movants make that enforcement of the subpoenas will constitute and illegal invasion of the sovereignty of the State of Alabama and the contention that this Court is without jurisdiction to enforce compliance with said subpoenas are without merit and cannot stand."

As to defendant's contention that the Supreme Court has original jurisdiction, there is no question. See Article III, § 2 of the Constitution of the United States. Also *United States* v. *West Virginia*, 295 U.S. 463, 470, and *United States* v. *California*, 297 U.S. 175, 187. However, it is not true that this jurisdiction is exclusive. In the *California* case, supra, the Supreme Court held that venue properly lay in the district court in California in
143 an appropriate case. See also *New York* v. *United States*, 326 U.S. 572, and *Colorado* v. *United States*, 219 F. 2d 474. Here, there is in 42 U.S.C.A. § 1971(c) and (d), specific and unambiguous Congressional authorization for actions such as this one to be commenced in this Court.

Because of the conclusions hereinafter reached by this Court in connection with the State's motion and in keeping with the duty of any court to avoid constitutionl questions unless essential to a proper disposition of a case,[16] this Court will not, at this time, pass upon the question of the constitutionality of Part IV of the Civil Rights Act of 1957. It is also unnecessary to discuss in this opinion the objections of the State upon the ground of comity.

The category of objections remaining concern the question of whether or not the Civil Rights Act of 1957 authorizes actions for preventive relief by the Attorney General against states. Without any doubt, the Congress of the United States had the authority to grant such a right.[17] The question here is: Did it confer that authority in this Act? This Court is of the opinion that Congress did not intend for such actions against states to be authorized by this Act.

There is no doubt that such authority would be appropriate—and even in certain circumstances necessary—if Congress intended to give full and complete authority to the Attorney General of the United States to enforce the

[16] For two recent cases reiterating this proposition see: *Harmon* v. *Brucker*, (1958), 355 U.S. 579, 581, and *Byer* v. *Byers*, (CCA 5, 1958), 254 F. 2d 205, 208.

[17] See the reasoning of this Court on the authority of the Federal Government in the field of voting in the case of *In re: George C. Wallace, et al.*, supra.

constitutional rights here involved. This Court judicially knows that the Civil Rights Act of 1957 was a compromise measure and the compromise reflected an intention on the part of Congress to give limited authority—as opposed to full and complete authority—in this field. A reading of the legislative history of this Act impresses this Court with the fact that if it had then been mentioned that this Act authorized the United States to sue a state for preventive relief, the Act would not yet be passed.[18] As a matter of fact, it is very definitely inferred by the following statement of Attorney General Brownell that the Act was only to be used to obtain preventive relief against individual persons:[19]

144 "Mr. Brownell. It is my opinion that the bill before you from which you quoted does not increase the Department's jurisdiction in connection with State primary elections. At the present time, our jurisdiction is limited to commencing criminal proceedings under sections 241 and 242, which are the criminal provisions of the civil-rights laws. Under 242, it is necessary that the wrongdoer be a State officer. In other words, that he be acting under color of law. Under section 241, you have to prove a conspiracy. The statute operates only against conspirators, in other words."

The Court must presume, therefore, that Congress in using only the word "person" deliberately restricted the authority of the Attorney General to institute such actions. Such reasoning as now used and the conclusion as is now reached is analogous to the reasoning and conclusion of the Supreme Court of the United States in *United States* v. *Mine Workers*, (1947), 330 U.S. 258, 275. In that case, the court held, among other things, that the Norris-LaGuardia Act did not apply to the "Government in all cases" and observed:

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[18] In this connection, see the testimony and statements of Attorney General Brownell before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, Eighty-fifth Congress, at pages 570, 589, 590, 591, 599, and 602.

[19] Ibid, page 606.

"The Act does not define 'person.' In common usage that term does not include the sovereign, and statutes employing it will ordinarily not be construed to do so . . . The absence of any comparable provision extending the term to *sovereign governments* implies that Congress did not desire the term to extend to *them.*" (Emphasis added.)

In accordance with the foregoing, an appropriate order will be entered dismissing this action as to each of the defendants.

Since the action is to be dismissed as to all defendants, the motion to produce, as to each of them and their objections thereto, and the motion to strike and quash service are moot.

Done, this the 6th day of March, 1959.

FRANK M. JOHNSON, JR.
United States District Judge

(File endorsement omitted)

145 IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

(Title omitted)

Judgment of Dismissal—March 6, 1959

Upon consideration of the motions of the defendants, Grady Rogers, E. P. Livingston, The Board of Registrars of Macon County, Alabama, and the State of Alabama, each seeking to have this action dismissed as to each of them, separately and severally, and for the reasons set forth by this Court in a memorandum opinion made and filed in this cause on this date, it is the

ORDER, JUDGMENT and DECREE of this Court that said motions be and they are hereby granted. It is the further

ORDER, JUDGMENT and DECREE of this Court that this action be and it is hereby dismissed as to Grady Rogers, E. P. Livingston, The Board of Registrars of Macon

County, Alabama, and the State of Alabama. It is the further

ORDER, JUDGMENT and DECREE of this Court that the cost of this proceeding be and it is hereby taxed against the United States.

Done, this the 6th day of March, 1959.

FRANK M. JOHNSON, JR.
United States District Judge

(File endorsement omitted)

146 IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

(Title omitted)

Motion for Stay—Filed March 6, 1959

Comes now the United States of America, by its attorneys and moves this Honorable Court for an Order staying the judgment herein entered on the 6th day of March, 1959, and for reasons therefor states as follows:

1. The judgment entered in this case pertains to issues involving substantial questions of law.

2. In order to preserve all rights of appeal which plaintiff, United States of America, may possess herein, it is necessary that the effectiveness of this Court's above-mentioned judgment be stayed to and including the 16th day of March, 1959, in accordance with the terms of the temporary restraining order entered in this case by the Court on March 5, 1959.

3. Unless the judgment entered herein is so stayed, irreparable injury can be done to the plaintiff herein, whereas, entry of an order staying that judgment can occasion no possible harm to defendants.

Respectfully submitted,

W. WILSON WHITE
W. Wilson White
Assistant Attorney General

Order Staying Judgment—March 6, 1959

This matter having come on on motion of the attorneys for the plaintiff, the United States of America, to stay the effectiveness of the judgment entered herein on 6th day of March, 1959, and it appearing to the Court for good cause shown that the effectiveness of said judgment should be stayed,

It is hereby ORDERED, ADJUDGED, and DECREED that the effectiveness of the judgment entered herein on the
147 6th day of March, 1959, be and here is stayed until and including March 16, 1959, and

It is further ORDERED that the temporary restraining order issued herein on March 5, 1959, be and hereby is continued in full force and effect until March 16, 1959.

It is further ORDERED that a certified copy of the foregoing motion and of this Order be served by the United States Marshal on Honorable McDonald Gallion, Attorney General of the State of Alabama, as attorney for the State of Alabama.

DONE this 6th day of March, 1959.

FRANK M. JOHNSON, JR.
Frank M. Johnson, Jr.,
United States District Judge

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148 **Marshal's Return on Service of Writ**

(Omitted in printing)

(File-endorsement omitted)

149 **Order Extending the Temporary Restraining Order—March 5, 1959**

(Omittted. Printed side page ~~132~~ 78 supra)

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150 **Marshal's Return on Service of Writ**

(Omitted in printing)

(File endorsement omitted).

151 IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA,
EASTERN DIVISION

(Title omitted)

Plaintiff's Motion and Order Directing the Clerk to Deliver the Original Record to Judge Richard T. Rives—March 6, 1959

Comes now the United States of America by its attorney, Hartwell Davis, and moves this Honorable Court for an order directing the Clerk of this Court to deliver the original record in this cause to Honorable Richard T. Rives, Judge, United States Court of Appeals for the Fifth Circuit on the 6th day of March, 1959, and as grounds therefor states as follows:

1. The United States wishes to appear before the United States Court of Appeals for the Fifth Circuit at the United States Post Office and Court House in Jacksonville, Florida at 2:30 P. M., on March 11, 1959, to present certain motions and request certain relief from said Court.

2. That it is agreeable with Judge Rives to carry the original record with him to Jacksonville in order that the Court may be fully informed.

Respectfully submitted

HARTWELL DAVIS
Hartwell Davis
United States Attorney

Order

The foregoing motion having been considered by the Court and the Court being of the opinion that same should be granted,

It is hereby ORDERED that the Clerk of this Court shall deliver to Judge Richard T. Rives the entire original record in this matter in order that the United States Court of Appeals may have same before it for its use in considera-

tion of any motions, petitions, and arguments which shall be made by the parties to this cause.

Done this March 6th, 1959.

FRANK M. JOHNSON, JR.
Frank M. Johnson, Jr.,
United States District Judge

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152 CERTIFICATE OF SERVICE

(Omitted in printing)

(File endorsement omitted)

153 IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

(Title omitted)

Notice of Appeal—Filed March 9, 1959

Notice is hereby given that the United States of America, plaintiff above-named, hereby appeals to the United States Circuit Court of Appeals for the Fifth Circuit, from the judgment entered in this action on March 6, 1959.

W. WILSON WHITE
W. Wilson White
Assistant Attorney General

CERTIFICATE OF SERVICE

(Omitted in printing)

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154 (Clerk's Certificate to foregoing transcript omitted in printing)

(File endorsement omitted)

155 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17,684

UNITED STATES OF AMERICA, *Appellant*,

versus

STATE OF ALABAMA, ET AL., *Appellees*.

Denial of Motion for Injunction Pending Appeal—March 11, 1959

Before RIVES and TUTTLE, Circuit Judges and SIMPSON, District Judge.

BY THE COURT:—

Upon the following assurance from the Attorney General of Alabama:

"The State of Alabama has itself subpoenaed these records through the Circuit Solicitor of Macon County, Alabama for use before the Grand Jury of that county. He now has custody and physical possession of the records. The State of Alabam itself is therefore interested in these particular records and their preservation, and the records are under the control of the legal department of the State of Alabama under this subpoena.

I, Mac Donald Gallion, as the Attorney General of the State of Alabama and the chief legal officer of said State, can and do assure this Court that these records will not be destroyed pending the final disposition of this cause should the Motion of the United States Government for a Stay Order or Temporary Injunction now before the Court be denied."

The Motion for Injunction pending disposition of the appeal is denied without prejudice to the renewal of said Motion before this Court if the Appellant hereinafter so desires.

March 11, 1959.

ENTER RIVES, *Judge*.

(File endorsement omitted)

156 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(Title omitted)

Before RIVES and TUTTLE, Circuit Judges, and SIMPSON, District Judge.

Order Granting Motion to Advance Appeal—March 11, 1959

ON CONSIDERATION of the Motion of Appellant to advance this appeal for hearing, and of the opposition thereto,

IT IS ORDERED that such Motion be, and the same is hereby granted. Accordingly, this cause will be expedited for hearing at New Orleans, Louisiana on April 27, 1959, upon the original typewritten transcript of record, as numbered, indexed and certified by the Clerk of the District Court, with four (4) legible copies of the brief for Appellant to be filed in typewritten form on or before March 25th, and the brief for Appellee to be filed in like form on or before April 22, 1959.

ENTER:

March 11, 1959.

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157 **Minute Entry of Argument and Submission—May 1, 1959**

(Omitted in printing)

158 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17684

UNITED STATES OF AMERICA, *Appellant*,

versus

STATE OF ALABAMA, ET AL., *Appellees*.

Appeal from the United States District Court for the Middle District of Alabama

Before HUTCHESON, Chief Judge, and CAMERON and JONES, Circuit Judges.

Opinion—June 16, 1959

HUTCHESON, Chief Judge: This appeal tests for error the order of the district judge dismissing the complaint as to all the defendants for the reason stated in his opinion[1] as to each.

159 This is the record. On February 5, 1959, the United States of America, appellant filed an action against appellees Grady Rogers, E. P. Livingston, and the Registration Board of Macon County, Alabama. This action was brought under Part IV of the Civil Rights Act of 1957 (P.L. 85-315, 71 Stat. 634, 42 U.S. Code, sec. 1971)[2] to obtain preventive relief against certain act and practices which deprive citizens of their right to vote on account of race or color.

The complaint specifically alleged the following facts. The appellees, the Registration Board and Rogers and Livingston, sued as members, who, under Alabama law are responsible for registering qualified citizens for voting,

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[1] United States of America v. State of Alabama, et al., 171 F. Supp. 720.

[2] Sec. 1971(c). "Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsec. (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person."

have engaged in certain discriminatory acts and practices. Among those practices are the maintenance of separate and segregated registration facilities for negroes; the application of more stringent and more rigid registration standards to negroes than to whites; and various other acts and practices which clearly set forth denial of registration to vote solely on account of race or color. Such discriminatory acts and practices have brought about and perpetuated a great disparity between the respective percentages of white and negro citizens of voting age registered to vote in Macon County, Alabama, despite the fact that negro citizens of voting age in Macon County greatly outnumber white citizens of voting age.[3]

Appellees Rogers and Livingston, who are not before the court as individuals but only as members of the Board of Registration, resigned as registrars of Macon County in Dec., 1958, some two months before this suit was filed. Their resignations were absolute and unconditional, and it was shown by affidavits, depositions and documents, that neither intended to serve again as a member of the Board of Registration, that their resignations had been accepted by the appointing board, and that each had accepted and qualified for another public office. The Registration Board, for the purpose of preventing negroes from registering, became inoperative during long periods of time from 1946 to present. The latest paralysis of that office occurred in December 1958 and was caused by the purported resignation of its only two members.

An injunction was sought to prevent the above named appellees from engaging in the alleged acts, practices, methods or procedures in whatever form, which discriminate against any applicant for registration for voting in Macon County, Alabama, on account of his race or color.

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[3] In 1958 white citizens of voting age numbered approximately 3100, whereas negro citizens of voting age numbered approximately 14,000. As of Dec. 1, 1958, white citizens registered to vote in Macon County numbered approximately 3,016, or approximately 97% of the white population of voting age; and the negro citizens registered to vote in Macon County numbered approximately 1100, or approximately 8% of the negro population of voting age. (Complaint, par. 8, 9, R. 3)

Subsequently on February 23, 1959, appellant amended the original complaint to include as a party defendant the State of Alabama. This amendment averred that the State of Alabama, through its agents, officials and agencies, had engaged in the discriminatory and unlawful practices specified in the complaint. The amendment sought a declaratory judgment of the illegality of these acts and practices and a judgment "enjoining Defendant State of Alabama from engaging in such illegal acts and practices in the future and from interfering with the performance of such acts and practices as may be required by the Constitution and laws of the United States and the decree of this Court".

Appellees filed motions to dismiss.[4] Essentially, appellee State of Alabama objected to the action on the ground that the Civil Rights Act of 1957 does not authorize suits against states but only individual "persons" and that the State is not a "person" within the meaning of the A..; that states have exclusive jurisdiction in the field of voting by virtue of the Tenth and Eleventh Amendments to the United States Constitution; that in any event the District Court has no jurisdiction over actions involving a state; and that the Civil Rights Act of 1957 is unconstitutional. Appellees Rogers, Livingston, and the Registration Board objected to the complaint on the ground that the suit was improperly brought against Rogers and Livingston because they had effectively resigned their office as registrars; that the Civil Rights Act of 1957 does not authorize suits against the Registration Board but only against individual persons; that the State of Alabama is an indispensable party; that the action is precluded by the Eleventh Amendment to the Constitution; and that the registration board was not a suable entity under the laws of the State of Alabama.

The court below dismissed the complaint as to all defendants. With respect to appellees Rogers and Livingston, it held that they could not be made defendants because their

[4] In addition to the motions to dismiss appellees filed several other motions including a motion to strike and quash service, an answer or objection to the motion to produce, and a motion to dissolve the temporary restraining order. The issues on these subsidiary motions were essentially the same as on the motions to dismiss.

resignations were effective in all respects, and that, under the applicable Alabama law registrars have no obligation to continue to serve until successors were appointed to fill that office. The court dismissed as to the Registration Board on the grounds that it was not a suable legal entity under Alabama law and that in any event the Civil Rights Act of 1957 does not authorize suit against such a board, but permits a suit only against individual persons as members of the Board.

The court held that the action would not lie against the State of Alabama, on the ground that the Civil Rights Act of 1957 did not authorize a suit against a state. Having held, for the reasons stated as to each, that none of the defendants were subject to the suit, the court entered a judgment dismissing it as to each.

163 Appealing therefrom, plaintiff-appellant is here urging against the judgment three specifications of error:

> 1. The District Court erred in holding that 42 U.S.C. 1971(c) does not permit the Attorney General to bring an action against the State of Alabama or the Board of Registrars of Macon County, Alabama.
>
> 2. The District Court erred in holding that an action under the Civil Rights Act of 1957 will not lie against registrars who have purported to resign their office, but for whom no successors have been appointed.
>
> 3. The District Court erred in holding that the Board of Registrars of Macon County, Alabama, is not a suable legal entity.

and seeking its reversal.

Paramounting the first specification, that the court erred in holding that the statute upon which the suit was based does not permit the Attorney General to bring an action against the State of Alabama, appellant devotes the major portion of its brief to a discussion and argument which, not confining itself to an interpretation and construction of the statute, but, taking far wider range, undertakes to discuss not the actualities of the jurisdiction claimed to have been conferred by the statute but the possibilities in general

of conferring upon the federal courts jurisdiction of an action against a state of the kind asserted here.

164 Interesting and engaging as these speculations are, we will not indulge in them here, but, confining ourselves to the sole question for determination, whether the statute supports the jurisdiction asserted, we will state simply but categorically, that we agree with the district judge that neither on its face nor in its history, taken alone or in connection with civil rights legislation in general, is there any reasonable basis for holding that, in providing "whenever any person, * * *", the congress intended to, or did, provide for suit against a sovereign state.

Without elaborating upon it, as under the settled law of the cases we could do in extenso, it is sufficient for us to simply say that, under the principle which has been, and still is, controlling upon the federal courts, whatever congress might or could do in providing in a civil rights action for conferring federal court jurisdiction over a state, it has never heretofore done so and it has not in terms done so in the statute invoked here.

Absent such specific conferring of jurisdiction, a federal court would not, indeed could not assume jurisdiction over a sovereign state without a precedent determination that, though the jurisdiction had not been expressly conferred, the language of the invoked statute carried the necessary, the unavoidable implication that the congress upon the gravest considerations and after the utmost thought and deliberation had intended to and did confer it.

165 Reading the statute as one will, such an implication cannot be found in it. For it cannot be reasonably contended: that the congress intended in a situation of this kind, where both the complaint and the Alabama statutes themselves, of which we take judicial knowledge, plainly show, that no exception or objection is, or can be, made on any kind of constitutional grounds to the will of the state there expressed to confer or that there is any need for or justice in finding authority, under this statute to sue the state itself for the wrongs upon the statute and upon it perpetrated by its allegedly unfaithful servants. Indeed, the gravamen of the complaint against the officers of the state who subvert and pervert the state's will,

166 as expressed in its statutes,* is that defendants Rogers and Livingston, "in the course of their official duties have discriminated against qualified negro citizens on account of their race or color, and a judgment is sought declaring such past acts and practices to be illegal under the constitution and laws of the United States. Further an order is sought enjoining said defendants so long as they remain responsible for the duties of their office and their successors when appointed and qualified from engaging in such illegal acts and practices in the future."

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* In Constantin v. Smith, a suit against the governor of the State of Texas, 57 F(2) 227, affirmed in Sterling, Governor of Texas v. Constantin, 287 U.S. 378, the court thus clearly and correctly stated the principles controlling in civil rights suits such as this one:

"Upon the first proposition advanced, that this is a suit against the state, and that as such it may not be maintained the authorities overwhelm; that this is a suit under the first subdivision of Sec. 41, 28 U.S.C.A., Sec. 24, Subd. 1 of the Judicial Code, to redress the deprivation of property arising under the Constitution and laws of the United States (Holt v. Indiana Mfg. Co., 176 U.S. 70). As such it is not a suit against the state, but against persons in their individual capacities, to prevent them from enforcing statutes in themselves unconstitutional, or unconstitutional as attempted to be enforced and applied. In such a suit, when it is found, that 'an individual, acting under the assumed authority of a state, as one of its officers, and under color of its laws, comes into conflict with the superior authority of a valid law of the United States, he is stripped of his representative character, and subjected in his person to the consequences of his individual conduct. The state has no power to import to him any immunity from responsibility to the supreme authority of the United States.' Ex parte Ayers, 123 U.S. 507; Reagan v. Farmers' Loan & Tr. Co., 154 U.S. 362; Ex parte Young, 209 U.S. 123; Yick Wo v. Hopkins, 118 U.S. 356; Truax v. Raich, 239 U.S. 33; Greene v. Louisville & Int. R.R., 244 U.S. 507; McMilan v. Comm., 51 F(2) 400; McLeaish v. Binford, 52 F(2) 151. In this suit plaintiffs invoke the exercise of the judicial power of the United States which, vested by the Constitution in its courts, extends to all cases of law and equity arising thereunder. * * * *"

"No exertion of this power rests on clearer or more certain grounds than that of its chancery jurisdiction. * * * *"

"Of the chancery jurisdiction no phase of it has a better settled basis, a more comprehensive and remedial scope than that which it employs to prevent persons, acting under the authority or color of state laws, from denying the due process and equal protection which the Fourteenth Amendment guarantees. This must necessarily be so; for, independent of each other in their respective spheres as are the state and federal governments, the Constitution of the United States is the supreme law of the land, and the courts of the United States, as the repositories of federal power, are compelled to and will assert and vindicate its supremacy, to protect the rights of individuals menaced by personal aggression masked under official power. * * * *"

We thus come to the second specification of error that, though, as the district judge expressly found, the two, sued as board members, had, some two months before the suit was brought, in good faith resigned their offices and each has taken another state office, they can and should be treated as still members of the board, to say of it that we think the short and simple answer to it is that the supposed need for some one to sue cannot be made, as appellant seeks to make it, to serve as a valid reason for re-
167 jecting out of hand the general principle, which underlies and conditions, existence and exercise of jurisdiction over a person sued in a particular capacity, that such person has that capacity.

In addition to pointing out, as the district judge did, that the remedy does not lie in perverting jurisdictional processes by means and to ends as injudicious as they are unjudicial, by holding one who is not an officer responsible as such, but that it lies in taking appropriate action under Alabama law to compel those authorized to, and responsible for, constituting and filling vacancies in the membership of the Board of Registrars to fill those offices, it is sufficient to say that these considerations aside, we are of the clear opinion that the reaons given by the district judge for rejecting this contention of plaintiff-appellant are sound, indeed unanswerable, and that we approve and adopt them.

Of the third and final specification, that the Board of Registrars, without members to be sued or served, constituted a legal entity which must stand in judgment in this suit, we think we need do no more than say that no sound argument is presented or authorities cited against the decision reached and the judgment entered by the district judge. Indeed, no argument is presented in support of the action which the court below was asked, but refused, to take, that is to assume jurisdiction over a board without members, a jurisdiction which, for lack of process it did not and could not assert, except the same argument of Necessity or
168 Desirability made in connection with the second specification. Putting to one side: that such an argument may not serve other than as a cautionary warning against too readily accepting an apparently wrong result as a right one; that it can never take the place of, or serve as real grounds for asserting, jurisdiction, to point out, as

the district judge did, that the remedy lies not in trying to sue a memberless board but in a suit against the appointing officers of the state to require the appointment of members to the board, we think it beyond any doubt that there is no basis for the claim that, in ruling as he did, for the reasons that he gave, the district judge in any way erred.

Stating: "It is the individuals on the Board and not the Board itself that conduct the registration; it is the individuals on the Board who may by their 'acts and practices' deprive other persons of rights and privileges secured by the Constitution of the United States; it is the individual members of the Board who are under a constitutional obligation relative to registering qualified applicants of Macon County, Alabama, to vote, therefore, it is for the individual officers that preventive relief—here in the form of injunctions—must be obtained against.", the district judge, citing *Handy Cafe, Ins.* v. *Justices*, 248 F(2) 485; *Hewitt* v. *City of Jackson*, 188 F(2) 423; and *Charleston* v. *City of Hialiah*, 188 F(2) 421, to which may be added *McSwan* v. *County Board*, 104 F. Supp. 861, *Gerald Graves* v. *City of Bolivar*, 154 F. Supp. 625, correctly we think, appraised the legal situation arising on the facts and correctly denied the
169 relief asked. In reaching this conclusion we have not overlooked or disregarded *Garner* v. *McCall* (Ala.), 178 So. 210 and *Boswell* v. *Bethea* (Ala.) 5 So. (2) 816, cited by the appellant as requiring a contrary ruling. We think appellant's reliance on them will not at all do. Indeed, we think that the Boswell case which dealt with an appeal from a judgment of the Circuit Court in a suit against the Board of Registrars, composed of the three members, naming them, explicitly confirms the position of the district judge that, suing a board having no members is as inconceivable in law as suing, as members of a board, persons who are not such, and that under the facts established and found, the judgment mut be affirmed.

AFFIRMED.

170 IN UNITED STATES COURT OF APPEALS

No. 17684

UNITED STATES OF AMERICA,

versus

STATE OF ALABAMA, ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by Counsel:

Judgment—June 16, 1959

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, Affirmed.

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171 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17,684

UNITED STATES OF AMERICA, *Appellant*,

versus

STATE OF ALABAMA, ET AL, *Appellees*.

Appeal from the United States District Court for the Middle District of Alabama

Order Transmitting Original Papers to the Supreme Court of the United States—Filed July 14, 1959

Pursuant to the request of counsel for appellant, to transmit to the Supreme Court of the United States the original papers that were before this Court in the above entitled and numbered cause for use in said Supreme Court in connection with the petition for certiorari.

IT IS ORDERED that the Clerk of this Court be, and he is hereby authorized to transmit to the Clerk of the Supreme Court of the United States, the original papers that were

filed in this Court as the transcript of record in the case, for use in connection with appellant's petition for writ of certiorari, said original papers to be returned upon final disposition of the case by the Supreme Court.

/s/ J. C. HUTCHESON, JR.
Chief Judge, U. S. Court of Appeals

July 14, 1959.

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172 Clerk's Certificate to foregoing transcript omitted in printing

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173 SUPREME COURT OF THE UNITED STATES

No. 398, October Term, 1959

(Title omitted)

Order Allowing Certiorari—November 16, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE 1960—536626/P.O. 918